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In The

Supreme Court of the United States

TITAN DISTRIBUTION, INC. AND
TITAN INTERNATIONAL, INC.,

Petitioners,

v.

ROBERT WAYNE CHALFANT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in applying the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, to Petitioners' decision not to hire Respondent.

2. Whether the Eighth Circuit erred in confirming the award of back pay and front pay to Respondent.

3. Whether the Eighth Circuit erred in holding there was sufficient evidence to submit the issue of punitive damages to the jury.

PARTIES TO THE PROCEEDING

Petitioners are Titan Distribution, Inc. and Titan International, Inc. No other entities have a pecuniary interest in the outcome of this case and no other publicly-held company owns 10% or more of Titan Distribution, Inc. or Titan International, Inc.

Respondent is an individual, Robert Wayne Chalfant.

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PETITION FOR A WRIT OF CERTIORARI

Titan Distribution, Inc. and Titan International, Inc. respectively petition a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit Court of Appeals' Opinion is reported at 475 F.3d 982 (2007). Its ruling is reprinted in the Appendix at 1-17. The District Court did not publish an opinion in this case. Its pertinent rulings are reprinted in the Appendix at 18-68.

JURISDICTION

Judgment was entered by the United States Court of Appeals for the Eighth Circuit on January 22, 2007. The Eighth Circuit denied Petitioners' Petition for Rehearing on February 26, 2007. The Eighth Circuit's denial is reprinted in Appendix at 69. This case involves the interpretation and application of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*

STATUTORY PROVISIONS INVOLVED

Applicable statutes and regulations: 42 U.S.C. § 12102, reprinted in Appendix at 70; 42 U.S.C. § 12111, reprinted in Appendix at 71-74; 42 U.S.C. § 12112, reprinted in

Appendix at 74-80, and 29 C.F.R. § 1630.2, reprinted in Appendix at 81-89.

STATEMENT OF FACTS

Titan Distribution, Inc. is a corporation that was created to distribute products manufactured by Titan Tire across the country. Titan International, Inc. is a holding company that has various tire manufacturing facilities all around the world. In 2002, Bill Campbell became the president of Titan Distribution and began to examine the financial losses that Titan Distribution was suffering. Titan Tire had lost some major tire supply accounts. Bill Campbell was looking for various ways in which Titan Distribution could cut its costs. One of the ways that Campbell chose to cut costs was through consolidation.

Prior to August 1, 2002, Titan had used a company called Quintak to run its tire mounting and distribution. Quintak employees were working out of a Titan-owned building and used Titan machinery in doing its work. Bill Campbell determined that Titan could do the work that Quintak was doing themselves. So, on August 1, 2002, Titan quit using Quintak. Previously, Quintak had had 52 employees doing the work for Titan but when Titan took over they decided they would only need 22 employees to do the exact same work.

Campbell decided that as part of the consolidation, they would completely eliminate the second shift in the tire and wheel mounting division. Campbell determined that the second shift could not be eliminated immediately – it would have to be phased out. Thus, from August 1, 2002 to September 30, 2002, Titan phased out the second

shift tire and wheel mounting division. During this phase-out time, Titan used employees from Labor Ready, a temporary work service. Robert Chalfant was one of those temporary employees.

On August 1, 2002, Quintak employees were told that if they wished to work for Titan, they could fill out a job application. They were also told that they would be given pre-employment physicals and that they would be interviewed. All employees hired by Titan would lose all seniority and any vacation they had accumulated with Quintak. They also would not have health insurance for four months.

Chalfant was one of the Quintak employees who had previously done work at Titan. Chalfant was the second shift supervisor in the tire and wheel mounting division for Quintak. Chalfant decided to apply for a job with Titan but he only applied for one position – second shift supervisor in the tire and wheel mounting division. As part of Titan's application process, Chalfant was given a physical by Dr. Anthony Sciorrotta on August 1, 2002. When Dr. Sciorrotta asked Chalfant what he did, Chalfant informed him that he drove a forklift. Dr. Sciorrotta listed Chalfant's position as a forklift driver. Dr. Sciorrotta passed Chalfant as a forklift driver but noted, "if the patient is expected to perform heavy lifting, I recommend a functional capacity evaluation by his doctor."

Dr. Jeffrey C. Schoon, Chalfant's physician, testified that Chalfant would not have passed a functional capacity evaluation. Dr. Schoon also testified that it would be difficult for Chalfant to lift more than five pounds on a regular basis or walk more than a half mile per day.

Following Chalfant's physical with Dr. Sciorrotta, he was interviewed by Nadis Barucic, Human Resources and Benefits Supervisor for Titan. Following the interview, Barucic forwarded Chalfant's application and the results of his physical from Dr. Sciorrotta to Titan headquarters in Quincy, Illinois.

From August 1 to August 8, 2002, Chalfant worked as a second shift supervisor in the tire and wheel mounting division but as an employee of Labor Ready. On August 8, 2002, Chalfant was informed by Titan that his services were no longer needed.

Titan continued to phase out the second shift in the tire and wheel mounting division and completely ceased its operation on September 30, 2002. Without a second shift in the tire and wheel mounting division, a supervisor for the second shift in the tire and wheel mounting division was not needed.

REASON FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE A SPLIT AMONG SOME OF THE CIRCUITS AS TO WHETHER BUSINESSES HAVE VIOLATED THE AMERICANS WITH DISABILITIES ACT WHEN THEY FAIL TO HIRE SOMEONE FOR A JOB THAT WILL BE, AND IS, ELIMINATED.

This case will determine how the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* will be applied when someone applies for a job which is eliminated for reasons that have nothing to do with the applicant. The Eighth Circuit held in this case that despite a company's plan to eventually eliminate the only job in

which Chalfant applied for, Titan was still liable for discrimination under the ADA for not hiring Chalfant for that very job. The Eighth Circuit also held that punitive damages could be assessed; and back pay and front pay given which extended beyond the time when the job applied for even existed.

The Eighth Circuit's decision in this case flies in the face of other circuit decisions and goes completely against common sense. Absent this Court's review, companies are on the line for failing to hire someone for a position that is soon to be eliminated and are liable for back pay and front pay which extend beyond the job's existence.

A. The Eighth Circuit Erred In Applying The Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.*, To Titan's Decision Not To Hire Chalfant.

To bring a successful ADA claim, Chalfant had the burden to show that he was "disabled" within the meaning of the ADA. The ADA defines a "disability" as "(A) physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

In a "regarded as" action, the claimant must show that the employer or potential employer "entertain[ed] misperceptions about the individual – it must [have] believe[d] either that one ha[d] a substantially limiting impairment that one d[id] not have or that one ha[d] a substantially limiting impairment when, in fact, the impairment [was] not so limiting." *Sutton v. United Air*

Lines, Inc., 527 U.S. 471, 489, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999).

Chalfant was required to put on evidence that he was regarded by Titan as being unable to work a class of jobs or broad range of jobs in order to meet the "substantially limits" requirement. *Sutton*, 527 U.S. at 491; *see also*, *Murphy v. United Parcel Svc.*, 572 U.S. 516, 523-24, 119 S. Ct. 2133, 144 L. Ed. 2d 44 (1999), 29 C.F.R. § 1630.2(j)(3)(i). Being regarded as being unable to perform a single job, or one particular job, is not a substantial limitation on the major life activity of working. *Maziarka v. Mills Fleet Farm, Inc.*, 235 F.3d 675, 679 (8th Cir. 2001).

In addressing the meaning of "class of jobs" under the ADA, this Court explained:

> To be substantially limited in the major life activity of working, . . . [an employee] must be precluded from more than one type of job, a specialized job or particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents), are available, one is not precluded from the substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

Sutton, 527 U.S. at 492.

Chalfant failed to meet his obligation by showing that Titan considered him disabled and unable to work in a class of jobs or broad range of jobs. Chalfant applied for one job – second shift supervisor in the tire and wheel mounting division. Chalfant did not apply for any other positions that were available with Titan. Chalfant did not even apply for a different shift within the tire and wheel

mounting division. The sole position Chalfant applied for had already been determined by Titan to be eliminated in the very near future. The whole second shift in the tire and wheel mounting division was completely eliminated by September 30, 2002. Nothing in the record indicates that Titan considered Chalfant ineligible for a "class of jobs" as the term is used under the ADA.

Even if Chalfant was able to establish a *prima facie* case of discrimination because of a disability, or perceived disability, Titan provided a non-discriminatory reason for its decision which "disclaims any reliance on the employee's disability in having taken the employment action." *Mustafa v. Clark County School District*, 157 F.3d 1169, 1175-76 (9th Cir. 1998). The analysis the *Mustafa* court used in an ADA discrimination case was developed by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) under Title VII of the Civil Rights Act of 1964. It is undisputed that Titan provided a legitimate, non-discriminatory reason for not hiring Chalfant – the elimination of the second shift in the tire and wheel mounting division was a reduction in its work force. Titan went from 52 people doing the work to 22 people.

The ADA prohibits an employer from discriminating against "an individual with a disability who can perform the "essential functions of the job" with reasonable accommodations. 42 U.S.C. § 12102(8). Chalfant had the burden, as the Claimant, to establish this. *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806, 119 S. Ct. 1597 (1999). Chalfant failed to meet his burden.

First of all, there was no job of second shift supervisor in the tire and wheel mounting division after September

30, 2002, to have essential job functions to review. Titan discontinued using Quintak and its employees on August 1, 2002 and completely eliminated the second shift in the tire and wheel mounting division by September 30, 2002. Chalfant applied for no other position with Titan other than the second shift supervisor in the tire and wheel mounting division. Even if he had applied for other positions, there were no other positions to give Chalfant. Titan was in the middle of a consolidation which led to a major job reduction. Jerry Palmer was the second shift supervisor in the tire distribution division, a completely separate division. Palmer retained his job only because his position was not eliminated.

Even if Chalfant had applied for a second shift supervisor position in the tire distribution division, he would not have met the essential functions of the job. Jerry Palmer testified that he would walk "miles" between the three floors, which included 66 stairs. He would lift up to 110 pounds at a time but most of the time the amounts he would lift would range from 70 to 80 pounds. Chalfant's own family physician, Dr. Jeffrey C. Schoon, testified that he could not have done this job.

If Chalfant would have applied for the first shift supervisor in the tire and wheel mounting division, which he did not, he would not have been able to perform the essential functions of that job either. Jerry Williams, the first shift supervisor in the tire and wheel mounting division testified that after Titan took over, he would walk 10 to 15 miles per day on the job. There was also a lot of lifting required ranging from 30 to 90 pounds for each wheel and tire assembly. All supervisor positions became more physical under Titan then they had under Quintak. Williams also testified that when he was helping to phase

out the second shift of the tire and wheel mounting division, that under Titan, he was required to do more lifting and walking than he'd ever done under Quintak.

Even if there had been a job of second shift supervisor in the tire and wheel mounting division, which there was not, Chalfant would not have been able to meet the essential functions of the job. Dr. Anthony Sciorrotta performed a physical on Chalfant when he applied for the job with Titan. Dr. Sciorrotta noted in his physical, "If patient is expected to perform heavy lifting, I would recommend a functional capacity evaluation from his doctor." Chalfant's own doctor, Dr. Schoon, testified that Chalfant could not lift more than five pounds or walk more than one-half mile per day. Dr. Schoon testified that Chalfant would not have passed the functional capacity evaluation. Chalfant put on no evidence to contradict his own doctor's testimony.

To recover under the ADA, Chalfant must establish that he could perform the essential functions of the job. First, there was no job to evaluate after September 30, 2002, and second, even if there was a job, based upon the testimony of Chalfant's own doctor, he would not have been able to perform the essential functions of that job.

In *Snead v. Metropolitan Property & Casualty Ins. Co.*, 237 F.3d 1080 (9th Cir. 2000), the employer reduced its staff from 33 employees to 10 employees while Snead was on short-term and long-term disability. *Id.* at 1085-86. When Snead wished to return to her position, she was informed that the position had been completely eliminated. *Id.* at 1086. The court held that the employer's business decision to reduce its workforce was independent of Snead's disability and thus the employer's actions were non-discriminatory. *Id.* at 1094.

Nearly all of the circuits have found that it is not unlawful under the Americans with Disabilities Act for an employer in reducing its workforce to discharge an employee from work by reason of a temporary disability or perceived disability. *See, e.g., Rhett v. Carnegie Center Associates*, 129 F.3d 290, 297 (3rd Cir. 1997) (position eliminated while on pregnancy leave); *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 53 (5th Cir. 1997) (employer under no obligation to create new job when old job eliminated).

The decision to eliminate the second shift in the tire and wheel mounting division was made by the president of Titan Distribution, Bill Campbell, immediately after he became president in early 2002. The phase out and eventual elimination of the second shift in the tire and wheel mounting division was completed on September 30, 2002. Chalfant put forth no evidence that the elimination of the second shift in the tire and wheel mounting division had anything whatsoever to do with Chalfant not being hired by Titan. Titan eliminated the shift for legitimate business reasons and the number of employees used in the tire and wheel mounting division was drastically reduced from 52 employees to 22 employees. None of the Quintak employees who had worked on the second shift in the tire and wheel mounting division were hired by Titan. Chalfant was treated no differently than non-disabled employees. *Simpson v. Des Moines Water Works*, 425 F.3d 538, 543 (8th Cir. 2004). The bottom line is that Chalfant was not hired by Titan for the single position he applied for, second shift supervisor in the tire and wheel mounting division, because the complete second shift in the tire and wheel mounting division was eliminated.

B. The Eighth Circuit Erred In Confirming The Award Of Back Pay And Front Pay To Chalfant.

Back pay is an equitable remedy under the Americans with Disabilities Act. The ADA expressly incorporates remedies available under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8, 2000e-9. Title VII, in turn, authorizes the district court to "order such affirmative action as may be appropriate, which may include . . . reinstatement, . . . , with or without back pay . . . or any other equitable relief as the court deems appropriate." *Id.* 2000e-5(g)(1). The reference to "other equitable relief," makes sense only if the relief previously described – reinstatement, which may be awarded with or without back pay – is itself equitable. *See, Great West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218, n.4, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002). Consistent with this language, circuit courts have held that "the award of back pay is an integral part of the equitable remedy of reinstatement," and must therefore be tried to the court. *Slack v. Havens*, 522 F.2d 1091, 1095 (9th Cir. 1975), *see also, Johnson v. GA Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969) ("The demand for back pay is not in the nature of a claim for damages, but rather is an integral part of statutory equitable remedy, to be determined through the exercise of the court's discretion, and not by a jury.")

Other court of appeals have reached the same result by emphasizing that back pay is purely discretionary and thus equitable. *See, e.g., Crocker v. Peidmont Aviation, Inc.*, 49 F.3d 735, 748 (D.C. Cir. 1995) ("[T]he characterization of Title VII back pay awards as equitable is bolstered by the fact that judges formally retain some degree of

equitable discretion in deciding whether to award back pay in individual cases once violations are proven, even though the Court has severely constrained the exercise of this discretion." (citation omitted)); *see also, Curtis v. Loether*, 415 U.S. 189, 197, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974) ("In Title VII cases, . . . the courts have relied on the fact that the decision whether to award backpay is committed to the discretion of the trial judge."); *Albemarlee Paper Co. v. Moody*, 422 U.S. 405, 443, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975) (Rehnquist, J., *concurring*) ("To the extent . . . that the District Court retains substantial discretion as to whether or not to award backpay notwithstanding a finding of unlawful discrimination, the nature of the jurisdiction which the court exercises is equitable and under our cases, neither party may demand a jury trial."). *Id.*

Other circuits have determined that back pay is equitable because it is restitutionary. *See, e.g., Robinson v. Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir. 1971) ("The back pay award is not punitive in nature, but equitable – intended to restore the recipients to their rightful economic status absent the effects of the unlawful discrimination."); *see also, Curtis*, 415 U.S. at 196-97, n.13, 94 S. Ct. 1005 ("In Title VII cases the court of appeals have characterized backpay as an integral part of an equitable remedy, a form of restitution."). Despite back pay being an equitable remedy, the jury was allowed to determine what Chalfant's damages were in back pay. The jury awarded Chalfant $60,000 in back pay.

At most, Chalfant's damages should have been limited to back pay from August 8, 2002 when Titan informed him that his services were no longer needed to September 30, 2002 when Titan completed the phase out by completely

eliminating the second shift in the tire and wheel mounting division. Instead, the jury found in Chalfant's favor and awarded him damages of $60,000 back pay. This award clearly exceeded the time in which the second shift tire and wheel mounting division even existed. It makes no sense to award Chalfant damages in back pay and front pay for work at a position that was eliminated for business reasons. It also flies in the face of circuit court decisions throughout the United States.

The District Court awarded Chalfant $18,750.00 in front pay. Front pay is an equitable remedy which should address Chalfant's equitable needs only, including the ability to obtain employment with comparable compensation and responsibility. *EEOC v. HBE Corp.*, 135 F.3d 543, 555 (8th Cir. 1998).

Even if Chalfant had not been allegedly discriminated against under the ADA by Titan, he would have worked on the second shift in the tire and wheel mounting division at Titan until the entire second shift was shut down on September 30, 2002. It cannot be considered equitable for Chalfant to come out better monetarily by not being retained by Titan than he would have been had he kept working with Titan until the entire second shift in the tire and wheel mounting division was shut down. This makes no sense whatsoever.

C. The Eighth Circuit Erred In Holding That There Was Sufficient Evidence To Submit The Issue Of Punitive Damages To The Jury.

In *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 119 S. Ct. 2118, 144 L. Ed. 2d 494 (1999), this Court addressed when punitive damages are available under the Americans

with Disabilities Act. The claimant must have suffered intentional discrimination by the employer who was acting with "malice or reckless disregard to a federally-protected right." *Id.* at 535. *See also,* 42 U.S.C. § 1981(a)(b)(1). This Court stated that "malice or reckless indifference pertained to the employer's knowledge that they may be acting in violation of federal law, not its awareness that it was engaging in discrimination." *Id.*

Chalfant presented insufficient evidence for the District Court to submit the issue of punitive damages to the jury. The Eighth Circuit bases its approval of the District Court submitting the issue of punitive damages to the jury based upon Bill Campbell's testimony that he and Cheri Holley, corporate counsel for Titan, knew that disability discrimination was illegal under federal and state laws. Campbell also testified that he was not the one who made the decision not to hire Chalfant. He did make the decision to completely eliminate the second shift of the tire and wheel mounting division which was the division which Chalfant was the supervisor of though. Thus, Campbell's knowledge regarding the federal and state laws about disability discrimination is completely irrelevant.

Next we turn to the other party whose knowledge is referenced by the Eighth Circuit. Cheri Holley did not testify at the Chalfant trial. Chalfant had an opportunity to call her as a witness but refrained from doing so. This Court cannot base the needed knowledge element in a punitive damage analysis on hearsay evidence of Bill Campbell. Titan should not suffer for Chalfant's failure to meet the necessary elements to have punitive damages be submitted to a jury.

No evidence was put on at trial that Titan was aware at the time that it decided not to hire Chalfant that it

"may [have been] acting in violation of federal law." *Kolstad*, 527 at 535. Titan interpreted Dr. Sciorrotta's report as finding that Chalfant had failed his physical for the position that Chalfant was applying for. Chalfant had applied for the second shift supervisor position in the tire and wheel mounting division and Dr. Sciorrotta's physical had indicated that Chalfant was approved for forklift driving. Also, the second shift in the tire and wheel mounting division had already been determined to be eliminated by Titan, which it was on September 30, 2002. Failing to hire Chalfant either from its reading Dr. Sciorrotta's physical report as to what Chalfant was approved to do or for not hiring Chalfant because the position was to be completely eliminated falls far short of the malice and reckless disregard that is required before punitive damages are submitted to a jury.

CONCLUSION

For the reasons set forth above, this Court should grant Petitioner's Petition for a Writ of Certiorari, and reverse the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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475 F.3d 982

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 06-1414

Robert Wayne Chalfant, Appellee, v. Titan Distribution, Inc.; Titan International, Inc., Appellants.	* * * * * * * * *	Appeal from the United States District Court for the Southern District of Iowa

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Submitted: September 28, 2006
Filed: January 22, 2007

Before LOKEN, Chief Judge, SMITH and GRUENDER, Circuit Judges.

GRUENDER, Circuit Judge.

A jury found that Titan Distribution, Inc. ("Titan") discriminated against Robert Wayne Chalfant based on Chalfant's disability and awarded him $60,000 in back pay and $100,000 in punitive damages. The district court[1] then

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[1] The Honorable Ross A. Walters, Chief United States Magistrate Judge for the Southern District of Iowa, presiding by consent of the parties pursuant to 28 U.S.C. § 636(c).

awarded Chalfant $18,750 in front pay and denied Titan's post-trial motions. Titan appeals. For the reasons discussed below, we affirm.

I. BACKGROUND

Titan, a division of Titan International, Inc., hired Quintak, Inc. to run its tire mounting and distribution operation. Quintak employees worked at Titan's building and used Titan's equipment. In July 2002, Titan decided to cut costs by terminating Quintak and hiring its own employees. William Campbell, president of Titan, announced that Titan would be hiring only a portion of Quintak's employees. All Quintak employees who wanted to work at Titan were required to apply for a position with Titan and have a qualifying physical. Nadis Barucic and Cheryl Luthin oversaw the application process.

Chalfant worked for Quintak as a second shift supervisor in the tire and wheel mounting division. His duties included loading trucks with a forklift. Jerry Williams was Chalfant's direct supervisor, and Martin Craig Warren was Williams's supervisor. At the time of Quintak's termination, Chalfant was 56-1/2 years old and had been working for Quintak for five years. Chalfant had suffered a heart attack in 1992 and had undergone carpal tunnel surgery and heart by-pass surgery in 1997. He had arthritis in his back, neck, ankle and hands.

Chalfant applied at Titan for the same position he had with Quintak, second shift supervisor in the tire and wheel mounting division. He believed that this position would have the same duties and responsibilities with Titan as it did with Quintak. In his application forms, Chalfant stated on a Voluntary Applicant Identification

Survey that he was physically handicapped. He based this conclusion on the fact that he had numerous physical ailments.

The final part of the application process, the physical examination, was conducted by Dr. Anthony Sciorrota. Dr. Sciorrota determined that Chalfant could work in his current capacity, including driving a forklift. Dr. Sciorrota also wrote on the exam record that Chalfant would need to have a functional capacity examination if he was required to do heavy lifting. Barucic received the exam record, wrote "px OK for lift driving" on the top of the record and sent it, along with the application, to Luthin. Chalfant continued working as a second shift supervisor in the tire and wheel mounting division as an employee of Labor Ready, a temporary work service used by Titan during the application period.

At some point after the physical exam, Barucic wrote "not pass px" on top of Chalfant's application. Barucic testified that he did not make the decision, but he did not know who told him to write that note. Luthin, in her deposition testimony, said that she did not know who decided that Chalfant failed the physical. However, during trial, Luthin changed her testimony and said that Cheri Holley, corporate counsel, made the decision in August 2002. At trial, Luthin testified that Barucic gave Holley the documents and Holley decided that Chalfant did not pass the physical. Holley did not testify at the trial.

During the first week of August 2002, Williams told Chalfant that he was included in a list of Quintak employees to be retained by Titan. On August 8, 2002, Williams and Warren told Chalfant that he had failed the physical and would not be hired. Jerry Palmer, the second shift

supervisor in the tire distribution division, assumed the duties of Chalfant's second shift tire and wheel mounting supervisor position. By September 30, 2002, Titan had eliminated the entire second shift in the tire and wheel mounting division.

After Titan refused to hire him, Chalfant took a job with AMPCO Systems, a parking ramp management company, within two months. At AMPCO, Chalfant performed general service work, walking up to five miles a day and lifting more than he did as a Quintak employee. His wages were half of what he earned at Quintak. Once he started working at AMPCO, Chalfant continued his job search by reviewing newspaper classifieds for other jobs. The day after he accepted his job with AMPCO, Chalfant received another offer. He declined that job offer because it required Chalfant to lift 150 pounds and Chalfant did not believe that he could do that type of lifting.

Prior to litigation proceedings, Titan maintained that it did not hire Chalfant because he did not pass the physical. Titan proferred this reason to the Iowa Civil Rights Commission. In a letter to the Commission, Titan said that Chalfant had a conditional offer of employment before the physical examination that was withdrawn after he failed the physical. During litigation, however, Titan claimed that Chalfant was not hired as a second shift supervisor because the entire second shift was going to be eliminated.

Chalfant sued Titan for disability and age discrimination under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.,* and the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.,* respectively, and the parallel provisions of the Iowa Civil Rights Act, Iowa Code ch. 216. The district court granted Titan's motion for

summary judgment as to the age discrimination claims and denied Titan's motion for summary judgment as to the disability discrimination claims. A jury found for Chalfant on the disability discrimination claims, awarding $60,000 in back pay and $100,000 in punitive damages. The district court then awarded $18,750 in front pay. The district court denied Titan's motion for judgment as a matter of law, its alternative motion for a new trial, its motion for remittitur[2] and its motion to alter or amend the front pay award under Fed. R. Civ. P. 59(e). Titan appeals.

II. DISCUSSION

On appeal, Titan contends that: (i) it is entitled to judgment as a matter of law or, in the alternative, a new trial because the evidence was insufficient both to support a verdict that Titan discriminated against Chalfant based on his disability and to allow the district court to submit the issue of punitive damages to the jury; (ii) the district court clearly abused its discretion in determining that Chalfant mitigated his damages to permit an award of back pay; and (iii) the district court abused its discretion in awarding Chalfant front pay. We address each argument in turn.

A. Sufficiency of the Evidence

Titan argues that it is entitled to judgment as a matter of law or, alternatively, a new trial because there was insufficient evidence for the jury's verdict of

[2] Titan challenged the award of back pay in its motion for judgment as a matter of law. However, we adopt the district court's characterization of Titan's back pay challenge as a motion for remittitur.

discrimination and for the jury to consider the issue of punitive damages. We review these issues under both standards of review and find that the district court did not err in denying Titan's motion for judgment as a matter of law nor did it abuse its discretion in denying Titan's motion for a new trial.

1. Judgment as a Matter of Law

"We review de novo the denial of a motion for judgment as a matter of law, applying the same standard as the district court." *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 899 (8th Cir. 2006). Judgment as a matter of law is granted only if "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Id.* at 899-900 (quoting Fed. R. Civ. P. 50(a)(1)). We grant the nonmoving party all reasonable inferences and view the facts in the light most favorable to the nonmoving party. *Id.* at 900.

a. ADA Discrimination

A plaintiff alleging discrimination based on a disability under the ADA must establish a prima facie case.[3] The three elements of this prima facie case are (1) that the plaintiff has "a disability within the meaning of the ADA;" (2) that he is qualified "to perform the essential functions

[3] We use the same analysis for disability discrimination claims brought under the ADA and the Iowa Civil Rights Act. *Mitchell v. Iowa Prot. & Advocacy Servs., Inc.*, 325 F.3d 1011, 1015 (8th Cir. 2003). Therefore, we need not separately analyze the Iowa Civil Rights Act claim.

of the job, with or without reasonable accommodation;" and (3) that he suffered "an adverse employment action due to a disability." *Wenzel v. Missouri-Am. Water Co.*, 404 F.3d 1038, 1040 (8th Cir. 2005). Titan challenges the sufficiency of the evidence supporting the jury's finding for Chalfant on all three elements of the prima facie case.

With respect to the first element of the prima facie case, the ADA defines disability in the following three ways: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2); *Webner v. Titan Distribution, Inc.*, 267 F.3d 828, 833 (8th Cir. 2001). A person is regarded as disabled if "(1) the employer mistakenly believes that the employee has an impairment (which would substantially limit one or more major life activity), or (2) the employer mistakenly believes that an *actual* impairment substantially limits one or more major life activity." *Wenzel*, 404 F.3d at 1041.

Major life activities are activities such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Conant v. City of Hibbing*, 271 F.3d 782, 784 (8th Cir. 2001) (per curiam) (quoting 29 C.F.R. § 1630.2(i)). In order to be regarded as disabled with respect to the major life activity of working, the employer must mistakenly believe that the actual impairment substantially limits the employee's ability to work. A substantial limitation is present only when the employee is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes." *Id.* at 784-85 (quoting 29 C.F.R. § 1630.2(j)(3)(i)). If an employer believes that an employee is unable to perform "one specific job," then the

employee is not regarded as disabled. *Wenzel,* 404 F.3d at 1041.

Titan regarded Chalfant as disabled because it mistakenly believed that his physical ailments substantially limited his ability to work in a broad range of jobs. Chalfant wrote in his application packet that he considered himself physically handicapped because of his ailments. Titan therefore knew about the ailments. Dr. Sciorrota, after conducting a physical of Chalfant, wrote that Chalfant could operate a forklift. He did not find that Chalfant failed the physical, although he did recommend that Chalfant undergo a functional capacity examination if he was required to do heavy lifting.

Titan argues that, at most, it only believed that Chalfant was incapable of performing the duties of the sole position of second shift supervisor in the tire and wheel mounting division. Chalfant only applied for that position, and Titan declined to hire Chalfant for that one position. If Titan did not believe that Chalfant was substantially limited in his ability to perform either a class of jobs or a broad range of jobs in various classes, Titan argues that Chalfant cannot show that he was regarded as disabled by Titan.

Giving all reasonable inferences to the jury's verdict in favor of Chalfant, we find sufficient evidence for a reasonable jury to conclude that Titan believed Chalfant's impairments substantially restricted his ability to work in a class of jobs or a broad range of jobs in various classes. While Chalfant only applied for the second shift supervisor position, that position did not require unique or strenuous lifting. Titan employees testified that there was no lifting requirement, or even a job description, for the second shift

supervisor position. Chalfant also testified that he had not been required to do any heavy lifting when he was the second shift supervisor for Quintak and Labor Ready. In the absence of any job description by Titan, Chalfant's vocational expert relied on the occupational literature's classification of a second shift supervisor and testified that if Titan believed Chalfant was unable to perform the duties of a second shift supervisor, a job that is classified as having light to medium strength demands, Chalfant would have been prevented from performing 70 percent of the jobs in the Dictionary of Occupational Titles. Thus, there was sufficient evidence from which a reasonable jury could have found that Titan did not believe that a person with Chalfant's medical impairments could work in a class of jobs or a broad range of jobs in various classes. Therefore, the jury could have reasonably found that Titan regarded Chalfant as disabled.

As to the second element of the prima facie case, there must be sufficient evidence for a reasonable jury to find that a person was qualified to perform the essential functions of the job. These essential functions are the "fundamental job duties." *Kammueller v. Loomis, Fargo & Co.*, 383 F.3d 779, 786 (8th Cir. 2004) (quotation omitted). While Chalfant must present evidence that he is qualified, Titan must first identify the fundamental job duties. Evidence that can be used to identify job duties includes:

> (1) the employer's judgment as to which functions are essential; (2) written job descriptions prepared before advertising or interviewing applicants for the job; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring the incumbent to perform the function; and (5) the current work experience of incumbents in similar jobs.

Id. (quoting *Heaser v. The Toro Co.*, 247 F.3d 826, 831 (8th Cir. 2001)).

Titan first argues that it cannot identify the fundamental job duties of the position of a second shift supervisor in the tire and wheel mounting division because that position did not exist after September 30, 2002. However, this argument fails because there was an available position at the time Titan decided not to hire Chalfant for the position. Titan had not announced the elimination of the position, the position was still on the organizational chart, and Chalfant actually applied for the position pursuant to Titan's invitation.

Titan then shifts its defense, claiming that the supervisor position requires significant walking and heavy lifting at times. Palmer, the second shift supervisor who assumed Chalfant's duties, testified that he had to walk more in his position after Titan replaced Quintak. Chalfant's doctor, Dr. Jeffrey Schoon, testified that Chalfant could not lift more than five pounds or walk more than one-half mile in one day. With this evidence, Titan argues that Chalfant would not have been able to meet the requirements of the second shift supervisor position.

Chalfant presented evidence that he performed the essential job functions of his position as second shift supervisor with Quintak. Chalfant testified that, as a supervisor, he was in charge of "keeping the work force moving and getting the product out the door." He also testified that he was required to drive a forklift and occasionally lift tires. Chalfant then presented evidence that he successfully completed the supervisor position duties at Titan as a Labor Ready employee during the first week of August, before he was told that he would not be

hired. Furthermore, the jury heard evidence concerning Chalfant's new position at AMPCO. In that position, Chalfant testified that he walked over five miles each day. Chalfant argued that he offered Dr. Schoon's testimony to prove his arthritis and not to address his ability to perform his job. Chalfant's vocational expert considered Chalfant's limitations and testified that he would be able to perform the supervisor position as described by Titan. The jury heard the evidence of both parties, and that evidence was sufficient for a reasonable jury to determine that Chalfant was able to perform the essential functions of the second shift supervisor position.

The third element of the prima facie case requires a showing that the person suffered an adverse employment action due to the disability. The refusal to hire a person is an adverse action. 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . the hiring . . . of employees.") An adverse action by itself is not sufficient for a successful claim under the ADA. Instead, there must be a "specific link" between the discrimination and the adverse action to prove that the discrimination motivated the adverse action. *Simpson v. Des Moines Water Works,* 425 F.3d 538, 542 (8th Cir. 2005). In other words, the disability must be a motivating factor in the employer's decision for the adverse action. *Id.*

Titan argues that Chalfant did not present sufficient evidence to establish a specific link between Chalfant's alleged disability and the adverse action of refusing to hire him. The position is no longer in existence, and Campbell testified that he made the decision to terminate the second shift at the beginning of 2002. Therefore,

Chalfant allegedly was not hired because there was not an available position, not because of Chalfant's disability. However, Titan did not eliminate the position until after Titan chose not to hire Chalfant. Titan accepted Chalfant's application for the position, had him take a physical exam, marked the exam results as passing and then marked the results as not passing before it decided not to hire him.

Although Chalfant did not actually fail, Titan told Chalfant that he could not work at Titan because he failed the physical exam. Titan even provided this reason for not hiring Chalfant to the Iowa Civil Rights Commission. It was not until the litigation proceedings that Titan claimed that the reason Chalfant was not hired was that the position had been eliminated. On these facts, a reasonable jury could decide that there was a specific link between the disability discrimination and Titan's decision not to hire Chalfant.

b. Punitive Damages

In employment discrimination cases, punitive damages are appropriate when the "complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1); *see Ollie v. Titan Tire Corp.*, 336 F.3d 680, 688 (8th Cir. 2003). To be liable for punitive damages, it is not sufficient that the employer simply knows that it is discriminating against an employee. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999). The employer must also know that it "may be acting in violation of federal law." *Id.*

Titan argues that there was insufficient evidence for the district court to submit the issue of punitive damages to the jury. Viewing the evidence most favorably to Chalfant, we find sufficient evidence to show that Titan acted with malice or reckless indifference in its decision not to hire Chalfant. Campbell testified that he and Holley knew that disability discrimination was illegal under federal and state laws. Titan also had knowledge of the federal disability discrimination laws because it had been a defendant in two federal disability discrimination cases that were ultimately appealed to our circuit. *See Ollie,* 336 F.3d at 680; *Webner,* 267 F.3d at 828.

Along with this strong evidence of Titan's familiarity with disability discrimination laws at the time it made the decision, Titan's inconsistent behavior at the time of the decision and its inability to explain its behavior could lead a reasonable jury to infer that Titan knew it might be acting in violation of federal law. In short order, Titan accepted that Chalfant passed his physical, notified him that he would be hired, changed the results of his physical to "failed" and notified him that he would not be hired. Until Luthin's sudden memory improvement at trial, no one at Titan could say who made the decision to alter the outcome of the physical examination from "pass" to "fail," and no one from Titan ever explained the impetus for that change. Instead, each person simply denied that he or she had any involvement at all in the decision not to hire Chalfant. A reasonable jury could infer that this unusual decision-making process occurred because Titan was aware at the time it decided not to hire Chalfant that it "may [have been] acting in violation of federal law." *Kolstad,* 527 U.S. at 535. Therefore, there was sufficient

evidence to support the submission of the issue of punitive damages to the jury.

2. New Trial

We review a district court's denial of a motion for a new trial for an abuse of discretion. *Foster v. Time Warner Entm't Co.,* 250 F.3d 1189, 1197 (8th Cir. 2001). The district court has the "sound discretion" to grant a new trial, and we will not reverse its decision unless there is a "clear showing of abuse of discretion." *Watson v. O'Neill,* 365 F.3d 609, 614 (8th Cir. 2004). However, we will reverse the district court's determination when the outcome is "against the great weight of the evidence so as to constitute a miscarriage of justice." *Foster,* 250 F.3d at 1197. Applying this standard of review, we do not find that the jury's findings of disability discrimination and punitive damages were against the great weight of the evidence so as to constitute a miscarriage of justice. Therefore, the district court did not abuse its discretion in denying Titan's alternative motion for a new trial.

B. Back Pay

We review a district court's denial of a motion for remittitur regarding back pay for clear abuse of discretion. *Duty v. Norton-Alcoa Proppants,* 293 F.3d 481, 496 (8th Cir. 2002). When an employer makes a discriminatory employment decision against an individual, that individual has a duty to look for another position to mitigate his damages. *Canny,* 439 F.3d at 904-05. The individual is not required to "go into another line of work, accept a demotion, or take a demeaning position." *Id.* (citing *Hartley v. Dillard's, Inc.,* 310 F.3d 1054, 1061 (8th Cir. 2002)). Also,

the individual's efforts do not have to "be successful but must represent an honest effort to find substantially equivalent work." *Hartley,* 310 F.3d at 1061. The employer has the burden to prove that the individual did not mitigate his damages. *Id.*

Titan argues that Chalfant did not properly mitigate his damages and that his back pay award should be reduced. The district court, however, determined that the jury could reasonably find that Titan did not meet its burden of proving that Chalfant failed to mitigate his damages. The record shows that Chalfant sought and accepted other employment within two months. He began working at AMPCO Systems, and he then continued his job search by looking at newspaper classifieds. Chalfant also turned down another job after he started working at AMPCO because that other job required lifting up to 150 pounds and Chalfant did not believe he could satisfy that requirement. Titan relies on testimony from Chalfant's and Titan's vocational experts that Chalfant would have been able to find a better paying job. There was also testimony from Chalfant's vocational expert, though, that at Chalfant's age it would be difficult to find a similar paying job. With this evidence, we cannot say the district court clearly abused its discretion in concluding that the jury could reasonably find that Chalfant mitigated his damages. *See id.* at 1062 (awarding back pay to the plaintiff because he was close to retirement age and had a difficult time finding a comparable job).[4]

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[4] We need not otherwise determine whether the amount of back pay awarded is appropriate because Titan's appeal only seeks to reduce the award based on its argument that Chalfant did not mitigate his damages.

C. Front Pay

We review a district court's decision to award a plaintiff front pay for abuse of discretion. *Ollie,* 336 F.3d at 687. Front pay "make[s] a party whole when reinstatement is impractical or impossible." *Id.* (quotation omitted). The purpose of front pay is to address the equitable needs of the employee, including his ability to find another position with a similar salary. *Id.*

Titan and Chalfant agreed that reinstatement was not practical. While Chalfant sought an award of front pay that would compensate him for six years, the district court determined that front pay should cover only one year. The district court awarded Chalfant $18,750, representing the difference between Chalfant's wages and health insurance benefits at AMPCO and what they would have been at Titan for the one-year period. The district court reasoned that Chalfant should be able to find employment similar to the Titan position within one year. Titan argues that the district court erred in providing this award because Chalfant did not attempt to find a comparable job. The district court, however, properly considered evidence that Chalfant continued to seek employment comparable to that at Titan by reviewing newspaper classifieds. Based on this evidence, the court did not abuse its discretion in its decision to award front pay.[5]

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[5] We need not determine whether the amount of front pay is appropriate because Titan does not challenge the amount of the district court's award. Instead, Titan only appeals the district court's decision to award front pay.

III. CONCLUSION

Accordingly, we affirm the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ROBERT WAYNE CHALFANT, Plaintiff, vs. TITAN DISTRIBUTION, INC. and TITAN INTERNATIONAL, INC., Defendants.	)	Civil No. 4:03-cv-30569-RAW

RULING ON POST-TRIAL MOTIONS:
(1) DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR MOTION FOR NEW TRIAL; (2) PLAINTIFF'S F.R.C.P. RULE 59(e) MOTION FOR NEW TRIAL OR TO AMEND JUDGMENT ON ISSUE OF FRONT PAY; AND
(3) PLAINTIFF'S MOTION FOR AWARD OF ATTORNEY FEES AND EXPENSES

(Filed Dec. 30, 2005)

The above post-trial motions [66, 67, 68, 69, 70, 75, 77, 88] are before the Court following hearing. This case came on for trial before the Court[1] and a jury on June 6, 2005 on plaintiff's perceived disability claim under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12100, *et seq.*[2] On

[1] The case was referred to the undersigned for trial and all further proceedings pursuant to 28 U.S.C. § 636(c).

[2] Chalfant also sued under the parallel provisions of the Iowa Civil Rights Act (ICRA), Iowa Code ch. 216, *et seq.* Iowa courts have analyzed ICRA disability discrimination claims under the same analytical framework as the federal courts under the ADA. *Casey's General Stores,*

(Continued on following page)

June 9, 2005 the jury returned a verdict in favor of plaintiff Robert Chalfant and against defendants (jointly referred to in the record as "Titan") in the amount of $60,000 for back pay and $100,000 in punitive damages. The jury found no damages for emotional distress. The issue of prospective equitable relief in the form of front pay was submitted to the Court. On July 8, 2005 the Court found Chalfant should receive front pay in the amount of $18,750. A judgment totaling $178,750 was thereupon entered. The above-captioned motions followed.

TITAN'S POST-TRIAL MOTION

As the Court understands Titan's post-trial motion and supporting brief, Titan makes the following arguments: (1) there was insufficient evidence to support the jury's finding that Titan regarded Chalfant as disabled within the meaning of the ADA; (2) the evidence was insufficient to support the jury's finding that Chalfant could have performed the essential functions of the job of second shift supervisor in the tire and wheel mounting division; (3) the evidence was insufficient to support the jury's finding that Chalfant's physical impairments were a motivating factor in Titan's decision not to hire Chalfant for the second shift supervisor position; (4) Chalfant failed to mitigate his damages; (5) the evidence was insufficient to submit the issue of punitive damages to the jury; and (6) the Court abused its discretion in awarding front pay. It is appropriate to pigeonhole these issues. Items (1), (2), (3) and (5) based on the insufficiency of the evidence seek

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Inc. v. Blackford, 661 N.W.2d 515, 519 (Iowa 2003); *Howell v. Merritt Co.,* 585 N.W.2d 278, 280-81 (Iowa 1998). It is therefore not necessary to separately analyze the parallel state claim.

judgment as a matter of law on the issues described and are cognizable under Fed. R. Civ. P. 50(b). Item (4) in essence incorporates the argument that the verdict for actual damages is excessive because of Chalfant's alleged failure to mitigate. Titan contends the award should be reduced, presumably through remittitur, relief which can only be granted in the context of a motion for new trial. (Def. Motion ¶ 2). To the extent Titan's attack on the front pay award in Item (6) is based on the argument that if judgment as a matter of law is denied on the merits, the Court should nonetheless reconsider the award of front pay (*see* Def. Motion ¶ 4), the Court will view the motion as one to alter or amend judgment under the authority of Fed. R. Civ. P. 59(e) as the motion in this regard would involve "reconsideration of matters properly encompassed in a decision on the merits." *Osterneck v. Ernst & Whinney,* 489 U.S. 169, 174 (1989) (quoting *White v. New Hampshire Dept. of Employment Security,* 455 U.S. 445, 451 (1982)). The front pay issue in Titan's motion will be addressed together with Chalfant's Rule 59(e) motion on the same subject.

Judgment as a Matter of Law (JAML) Standard

As noted, Titan's JAML motion questions the sufficiency of the evidence on the merits or to support punitive damages.[3] Where sufficiency of the evidence is the JAML

[3] In Fed. R. Civ. P. 50 motions made at the conclusion of Chalfant's case in chief and renewed at the close of the evidence, Titan moved for judgment as a matter of law on the general ground that the evidence was legally insufficient to find perceived disability discrimination, and on the specific grounds (1) that it was impossible for Titan to have given Chalfant the job he applied for because it was eliminated about two months after the hiring decision was made, *see infra* at 11, and (2) the

(Continued on following page)

issue, a movant "faces an onerous burden." *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701, 707 (8th Cir. 2004) (quoting *Inacom Corp. v. Sears, Roebuck & Co.*, 254 F.3d 683, 689 (8th Cir. 2001)).

> Judgment as a matter of law is proper "[o]nly when there is a complete absence of probative facts to support the conclusion reached" so that no reasonable juror could have found for the nonmoving party.

Henderson v. Simmons Foods, Inc., 217 F.3d 612, 615 (8th Cir. 2000) (quoting *Hathaway v. Runyon*, 132 F.3d 1214, 1220 (8th Cir. 1997)); *see Eich v. Board of Regents for Central Mo. State Univ.*, 350 F.3d 752, 761 (8th Cir. 2003); *Jaros v. LodgeNet Entertainment Corp.*, 294 F.3d 960, 965 (8th Cir. 2002). "[T]he court must assume as proven all facts that the nonmoving party's evidence tended to show, give [him] the benefit of all reasonable inferences, and assume that all conflicts in the evidence were resolved in [his] favor." *Hathaway*, 132 F.3d at 1220; *see Clark v. Kansas City, Mo. School Dist.*, 375 F.3d 698, 701 (8th Cir. 2004). What this means then is that Titan must demonstrate that "all the evidence points in its direction and is susceptible of no reasonable interpretation sustaining" Chalfant's position. *Ogden v. Waxworks, Inc.*, 214 F.3d 999, 1006 (8th Cir. 2000); *see Anderson v. Indep. Sch. Dist.*, 357 F.3d 806, 809 (8th Cir. 2004). In considering a JAML motion the court "may not make credibility determinations

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testimony of Chalfant's family doctor established he could not have performed the essential functions of the job. Chalfant does not argue failure to preserve any issue for review and the Court has proceeded to consider the merits of Titan's arguments. *See Conseco Financial Serv. v. North American Mort.*, 381 F.3d 811, 821 (8th Cir. 2004).

or weigh the evidence." *Garcia v. City of Trenton,* 348 F.3d 726, 727 (8th Cir. 2003) (citing *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150 (2000)); *see First Union Nat. Bank v. Benham,* 423 F.3d 855, 863 (8th Cir. 2005); *Anderson,* 357 F.3d at 809.

Discussion

1. Factual Background

In the May 24, 2005 ruling on Titan's motion for summary judgment the Court went to some length in setting out the factual background of this case. *Chalfant v. Titan Distribution, et al.,* 4:03-cv-30569-RAW, Ruling on Defendants' Motion for Summary Judgment, 2005 WL 1398494 (S.D. Iowa May 24, 2005) ("summary judgment ruling"). It is not necessary to repeat the entirety of that background here except as appropriate to address the sufficiency of the evidence issues raised by Titan's post-trial motion. The summary judgment ruling should be viewed in conjunction with this one. The factual description below views the evidence, and the inferences which can reasonably be drawn from the evidence, favorably to Chalfant.

Prior to August 1, 2002 Titan contracted with Quintak, Inc. to perform various services including mounting tires on rims, and warehousing and distributing tires produced by Titan at its Des Moines, Iowa plant. Chalfant was employed by Quintak and before that had been employed for many years by Quintak's predecessor, DICO. Chalfant became a Quintak supervisor in 1997 and at the time of the events in issue was employed performing work at Titan's plant as the second shift supervisor in the tire and wheel mounting division.

Effective August 1, 2002 Titan decided to perform the work Quintak had been doing. Quintak's employees were told that if they wished to continue to work at the Titan plant they had to apply for employment with Titan. Chalfant applied for the second shift supervisor position he had held with Quintak. He continued to work at the Titan plant until August 8, 2002, though after August 1, 2002 he was temporarily employed, as were the other remaining Quintak employees, by Labor Ready, a temporary employment service company.

The application process involved submitting a written application, an interview with Titan human resources employee Nadis Barucic, and a physical examination by a Titan contract doctor, Dr. Anthony J. Sciorrota. As a part of the written application Chalfant completed a "Voluntary Applicant Identification Survey" in which he checked the "Yes" box indicating he was "Physically Handicapped." Chalfant thought he should respond affirmatively because he did have physical impairments as a result of his extensive medical history. He had had two prior heart attacks, the second in 1997 following which he had open heart surgery with five bypasses. He had arthritis in his hands, and had had numerous surgeries performed on his right hand, including carpal tunnel surgery. He had also had elbow surgery on one occasion. He had had back surgery twice before, a lumbar fusion as a teenager, and a cervical fusion in the mid-1980's.

Chalfant did not recall much about his interview with Barucic other than that Barucic seemed interested in how much work Chalfant had missed. Chalfant told Barucic he missed perhaps two or three days a year.

When he saw Dr. Sciorrota Chalfant was honest about his health history, truthfully answering the medical questionnaire. He told Dr. Sciorrota about his various surgeries and health problems, all of which were duly noted by Sciorrota in his record of the examination. Chalfant fully and accurately described to Sciorrota what his duties entailed as second shift supervisor. These involved supervising the employees who worked under him, keeping the product moving and getting it out the door in good condition. Chalfant spent most of his time driving a fork lift and typically would not have to do any lifting, though he might on occasion be required to pick up a 50-pound tire.

In his medical examination report Dr. Sciorrota wrote that Chalfant was medically able to work in his current capacity, which he described as "fork lift driving." Dr. Sciorrota's physical examination comments added that if Chalfant was expected to perform heavy lifting, he (Dr. Sciorrota) would recommend a functional capacity examination as well as documentation from Chalfant's treating physicians. Sciorrota did not specify a lifting restriction.

Dr. Sciorrota saw Chalfant on August 1, 2002. Apparently the results of his examination were communicated to Barucic that same day because Barucic made a note on the top of the employment application dated August 1 which said: "px OK fork lift driving," indicating Chalfant had passed the physical examination and was capable of operating a fork lift. (Ex. 2)

Barucic sent the employment application and the medical records he received from Dr. Sciorrota to his Titan corporate superiors. Precisely when and how he did so is not completely clear from the record, but Barucic testified,

in substance, that he either faxed the application and medical records shortly after August 1, 2002 to Titan's corporate human resources manager, Cheryl Luthin, at Titan's Quincy, Illinois headquarters, or delivered the documents to Luthin and/or corporate counsel Cheri Holley on one of their trips to Des Moines.

Luthin distanced herself from the employment decision. While she admitted Barucic faxed information to her from time to time, she could not be sure that the information included employment applications and she did not think Barucic faxed medical information to her. She thought she may have seen Dr. Sciorrota's medical records a month or two after the fact.

Barucic later made a second note at the top of Chalfant's application: "Not pass px." Barucic testified sometime later someone, he did not remember who, told him Chalfant did not pass the physical and that is when he added the second note. Prior to trial Luthin had also testified in a deposition she did not know who had made the determination Chalfant had not passed his physical. Her testimony changed at trial. Luthin testified corporate counsel Holley made the decision when Luthin and Holley were in Des Moines early in August 2002. She testified she saw Barucic hand Holley some documents, apparently Dr. Sciorrota's records of his examination of Chalfant, whereupon Holley "on the spot"[4] told Luthin Chalfant did not pass the physical and gave Barucic instructions as to what to do. Holley did not testify.

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[4] On examination by Chalfant's counsel Luthin agreed with this description.

In view of Barucic's trial testimony, and Luthin's deposition testimony, the jury might have found it hard to tell who to believe. It is clear, however, that Titan was aware Chalfant had described himself as handicapped, was aware of Chalfant's health history as noted by Dr. Sciorrota, and gave as the reason for the decision not to hire Chalfant that he had not passed the physical. That is what Chalfant says he was told by Titan facility engineer Don Brown, tire mounting manager Jerry Williams to whom Chalfant reported, and Williams' boss, Craig Warren, when they approached Chalfant on August 8, 2002 and told him he would have to leave the plant.[5] That is also what Titan told the Iowa Civil Rights Commission (ICRC) and the Equal Employment Opportunity Commission (EEOC) in response to Chalfant's administrative complaints.

In fact, Chalfant had not failed his physical examination. Dr. Sciorrota had, as noted, recommended a functional capacity examination if Chalfant was expected to do heavy lifting, but heavy lifting was not required of a shift supervisor in the tire and wheel mounting division. Quintak had not had a lifting requirement, Titan did not have a relevant job description with a lifting requirement and Chalfant's superiors did not know of any such requirement. The occasional need to lift a 50-pound tire is not heavy lifting.

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[5] Brown had been employed by Titan for about seven years and had known Chalfant for a long time from their prior employment together at DICO. Williams was a former Quintak employee retained by Titan who, as manager of the tire mounting area, supervised Chalfant. Warren was the former Quintak warehouse manager and was retained by Titan in essentially the same capacity effective August 1, 2002. Warren was over Williams.

Chalfant did not return to work at the Titan plant after August 8. He was not hired for the second shift supervisor position. Jerry Williams had told Chalfant that he was on a list of employees to be retained by Titan. Titan's letters to the ICRC and EEOC indicate Chalfant would have been sent for a physical after having received a conditional offer of employment. Williams and Warren both thought a lot of Chalfant and wanted to keep him employed for Titan. They had the authority to hire Chalfant subject to the physical examination requirement. Chalfant's duties as second shift supervisor were reassigned to another employee. The second shift was eliminated by September 30, 2002. Warren testified that had Chalfant been working when the second shift was eliminated, he would have looked for another job for Chalfant to perform at Titan.

Titan has claimed one reason for the decision not to hire Chalfant was the planned elimination of the second shift. There is some question as to when the decision was made, but on August 8 the elimination of the second shift had not been announced, the job of second shift supervisor remained on the charts, Titan had interviewed Chalfant for the job, the only reason for the hiring decision given by Titan prior to the litigation was that Chalfant had not passed the physical examination, and when he was not hired Chalfant's duties as second shift supervisor were reassigned to another employee.

Chalfant looked for substitute employment and within two months was hired by AMPCO Systems. AMPCO manages parking lots in the city of Des Moines. Chalfant was hired to perform general service duties. His day begins with a security round of the two multi-story parking lots for which he is responsible. In the evening he

cleans up in the lots. In the interim he helps customers change tires, puts air in tires, unlocks cars, fills in for the cashier as needed, and does other miscellaneous jobs. His work entails a lot of walking, up to about five miles a day according to the pedometer he wears, and he does more lifting than he did when he worked for Quintak.

Chalfant's AMPCO wages are about half what they would have been at Titan. After Chalfant obtained employment with AMPCO he stopped looking for other employment. He did so primarily out of concern about his health insurance benefits, which he has at AMPCO though at a higher cost to him than it was at Quintak. When he ceased working for Quintak Chalfant was led to believe he would be eligible for COBRA benefits, but it turned out the insurer had canceled Quintak's insurance plan and COBRA benefits were not available to its former employees. At the time Chalfant was 57 years old, and his wife 66. They were dependent on his employment for health insurance. Chalfant had, as noted, many health problems, and his wife was not in good health. Chalfant testified he is concerned that if he gets another job he might have to wait awhile before he becomes eligible for health insurance benefits. He described the prospect of an interruption in health insurance coverage as one of his biggest fears.

Titan takes issue with the sufficiency of the evidence to establish three elements of Chalfant's ADA claim: that Titan regarded his physical impairments as substantially limiting his ability to work; that Chalfant could have performed the essential functions of the job of second shift supervisor in the tire and mounting division; and that Chalfant's physical impairments were a motivating factor in Titan's decision not to hire him for that job. (*See* Inst.

No. 10). The Court will address these in turn, followed by the other grounds asserted in Titan's motion.

2. Regarded As Disability

The ADA prohibits discrimination in employment against individuals who, though not actually disabled, are "regarded as" having a disability within the meaning of the ADA. *Sutton v. United Airlines, Inc.,* 527 U.S. 471, 489 (1999).

> "Regarded as" disability can occur in two ways: (1) the employer mistakenly believes that the employee has an impairment (which would substantially limit one or more major life activity), or (2) the employer mistakenly believes that an actual impairment substantially limits one or more major life activity.

Wenzel v. Missouri-American Water Co., 404 F.3d 1038, 1041 (8th Cir. 2005). In this circuit, "working" is considered to be a major life activity. *Nuzum v. Ozark Automotive Dist., Inc.,* ___ F.3d ___, ___, 2005 WL 3526707, *4 (8th Cir. Dec. 27, 2005). Substantially limited in the major life activity of working means more than being unable to work, or perceived to be unable to work, at a particular job or narrow range of jobs. *Wenzel,* 404 F.3d at 1041 (citing *Wooten v. Farmland Foods,* 58 F.3d 382, 386 (8th Cir. 1995)). "When the major life activity considered to be substantially limited is working, the ADA requires at a minimum that the employee is perceived as unable to work in a broad class of jobs." *Ollie v. Titan Tire Corp.,* 336 F.3d 680, 685 (8th Cir. 2003); *see Sutton,* 527 U.S. at 491 (quoting EEOC Regulation 29 C.F.R. § 1630.2(j)(3)(i), substantially limits means "significantly restricted in the ability to perform either a class of jobs or a broad range of

jobs in various classes as compared to the average person having comparable training, skills and abilities").

Titan argues the evidence shows no more than that Titan perceived Chalfant as unable to perform the specific job for which he applied, second shift supervisor in the tire and wheel mounting division. Whether the evidence was sufficient to permit the jury to conclude Titan regarded Chalfant's non-limiting impairments from his various medical conditions as rendering him unable to work in a class of jobs or a broad range of jobs as opposed to just the second shift supervisor job is the substantial issue on Titan's Rule 50 motion.

As noted in the summary judgment ruling, it is difficult as a practical matter for an ADA "regarded as" plaintiff whose application for a specific job is denied to establish that the employer had anything other than the specific job in mind. (Ruling at 15). However, just because the applicant applies for a specific job, or a narrow set of jobs, does not invariably lead to the conclusion that the employer did not regard the applicant as substantially limited in the ability to work in the broader sense contemplated by the statute. If that were the case, absent direct evidence of the employer's perception, this prong of the disability definition would not mean very much. The jury having returned a verdict in favor of Chalfant, the question at this juncture is whether, giving Chalfant the benefit of every reasonable inference which can be drawn from the evidence, the jury could conclude Titan regarded him as significantly restricted in performing a class of jobs or a broad range of jobs in various classes. Having considered the matter again in light of the evidence produced at trial, the Court continues to believe the jury could so find.

The jury could reasonably have found as follows from the trial evidence. Though Chalfant applied only for the second shift supervisor position in which he had been employed by Quintak, his application was part of a process in which Titan was vetting Quintak's former employees for possible employment with Titan. Titan did not have a job description for the shift supervisor job which imposed a strength or lifting requirement, and the job as described by Chalfant, was not particularly physically strenuous. According to Chalfant's vocational expert, Roger Marquardt, Chalfant's job was classified in the occupational literature as having light to medium strength demands. The job entailed supervision of shift employees and the principal physical activity involved was operation of a fork lift. Titan knew the job did not have significant physical demands.

Titan also knew from Chalfant's application papers that he considered himself to be handicapped as a result of his extensive medical history. Titan was aware of that history from Dr. Sciorrota's examination and the information provided to him by Chalfant as reflected in Dr. Sciorrota's medical records, all of which had been provided to Titan. Titan knew Dr. Sciorrota had cleared Chalfant to operate a fork lift. Though Dr. Sciorrota had recommended a functional capacity examination if heavy lifting was required, heavy Lifting was not a part of Chalfant's job. Thus, Chalfant had passed his physical examination as indicated on the first note Barucic wrote on his application. Titan knew he had passed the examination.

Though he had passed the physical and been assured by his supervisor that he was on the list to be hired, Titan, allegedly in the person of its corporate counsel Holley, directed that Chalfant not be hired because he had not

passed the physical. As noted, Titan knew that was not true and consequently the jury could have found that was not the true reason for the hiring decision but a pretext for some other reason or reasons. The real reason was related to Chalfant's physical condition, but had to do with Chalfant's history of health problems with his back, heart, hands, elbow and arthritis and the kinds of impairments associated with the conditions noted by Dr. Sciorrota, not a failure to pass the pre-employment physical examination. After all, according to Luthin, Holley rejected Chalfant immediately after having reviewed the medical information from Dr. Sciorrota.

From the facts Chalfant had been medically cleared for the job for which he applied and was otherwise well-qualified, the jury may reasonably have found that the perception Chalfant was unable to work extended beyond the modest physical requirements of the shift supervisor's job to a perception that as a self-described handicapped person with impairments, real or assumed, resulting from numerous medical problems over the years, he was not the kind of worker Titan wanted in its plant. In other words, the jury may have believed Titan saw Chalfant as generally disqualified from work in Titan's manufacturing plant because of his physical impairments, even from a job the company doctor said he could perform. So viewed, the perception could reasonably have been seen by the jury as extending to a broad class of jobs permitting a finding in Chalfant's favor on the "regarded as" element.[6]

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[6] Vocational expert Marquardt also opined that if Chalfant was perceived as unable to do the medium strength work of a fork lift operator/floor supervisor, he would have lost access to approximately 70% of the jobs defined in the Dictionary of Occupational Titles.

3. Essential Functions of the Job

Titan argues the evidence is insufficient on the element of Chalfant's ability to perform the essential functions of the second shift supervisor job for three reasons: (1) the job was eliminated by September 30, 2002, hence there were no essential functions because there was no job; (2) the job for Titan would not necessarily have been the same job he performed previously; and (3) the testimony of Chalfant's personal physician, Dr. Jeffrey Schoon, establishes that he could not have performed the essential functions of the job.

The second shift in the tire and wheel mounting division was eliminated by September 30, 2002, but the fact remains the job of shift supervisor was in place until then. Titan was interviewing to fill the second shift supervisor's job, and had Chalfant not been rejected because of his physical impairments he would have been hired.

The Court does not recall any evidence that the functions of the job were going to change materially under Titan from what they had been under Quintak, and Titan does not describe what the difference would have been. Chalfant had performed all of the essential functions of the second shift supervisor job, and performed them well, as an employee of Quintak for about five years before the hiring decision. From this alone the jury could find Chalfant could have performed the essential functions of the job.

Chalfant treated with Dr. Jeffrey Schoon, a family practice physician, in 2002, including within about a week after Chalfant was told to leave the plant. Schoon testified that Chalfant's most significant impairment concerning how much he could lift and carry was his generalized

osteoarthritis, which he characterized as moderate to severe. Schoon further testified he thought it would be difficult for Chalfant to lift more than five pounds on a regular basis or, except on a rare basis, walk more than a hundred yards up to perhaps half a mile. Schoon performed an informal functional capacity evaluation on Chalfant from which he concluded Chalfant could not lift and carry heavy objects on a frequent basis.

Schoon's testimony was definitely not helpful to Chalfant, but it does not mandate judgment as a matter of law in Titan's favor on the question of whether Chalfant could have performed the essential functions of the second shift supervisor job. The jury was not required to accept Schoon's testimony. As noted, Chalfant had performed the essential functions of the job for about five years. Dr. Sciorrota's report following his evaluation specifically for the purpose of determining whether Chalfant could physically perform the second shift supervisor job was arguably inconsistent with Dr. Schoon's opinions. Dr. Schoon's testimony about Chalfant's inability to do much walking is contradicted by Chalfant's testimony about the extensive walking he has done without difficulty in his current employment. Finally, the jury may have viewed Dr. Schoon's testimony as inconsistent with that of the vocational experts. Indeed Titan's expert, Kathryn Bennett, directly opined that Chalfant could perform the essential functions of a floor supervisor job like that he had performed for Quintak. The jury, of course, had an opportunity to observe Chalfant and assess the credibility of his testimony that he could perform the requirements of the second shift supervisor job, and his description of the physical demands of his current employment.

There was ample evidence to support the jury's finding that Chalfant could have performed the essential functions of the job of second shift supervisor in the tire and wheel mounting division.

4. Motivating Factor

Titan argues Chalfant's perceived physical impairments had nothing to do with the decision not to hire him as the second shift supervisor because the second shift was eliminated by September 30, 2002. Again, the only reason given to Chalfant, and later the ICRC and the EEOC, for not hiring him was that he had failed his pre-employment physical examination. Luthin's trial testimony concerning how the decision was made is probative that Chalfant's physical impairments were a motivating factor in the hiring decision. Holley looked at the medical information from Sciorrota and promptly rejected Chalfant as not physically qualified.

About two months after the hiring decision the second shift was eliminated, but as noted several times now, the job existed when Chalfant applied for it, he was interviewed for the job, he was not hired only because he did not pass the physical examination, and someone else was assigned to perform the duties of the job.

5. Mitigation

Titan seeks a reduction of the back pay award because Chalfant failed to mitigate his damages. The burden was on Titan to prove Chalfant failed to mitigate his damages. In order to establish this defense, Titan had "to show that the plaintiff failed to use reasonable care and diligence [to seek suitable alternative employment] and that there were

jobs available which the plaintiff could have discovered and for which the plaintiff was qualified." *Coleman v. City of Omaha,* 714 F.2d 804, 808 (8th Cir. 1983); *see Hartley v. Dillard's, Inc.,* 310 F.3d 1054, 1061-62 (8th Cir. 2002).

When the hiring decision put him out of work Chalfant promptly sought other employment and obtained the job with AMPCO. His job with AMPCO is not substantially equivalent work as he currently earns only about half of what he would have been making had he been hired by Titan. After he obtained the AMPCO job Chalfant ceased looking for other employment because he was concerned about an interruption in health insurance benefits if he took another job. Both vocational experts, Marquardt and Bennett, testified that Chalfant was capable of obtaining a job with a wage range similar to what he had earned before. Marquardt, however, questioned Chalfant's hireability. In his report he opined that even though Chalfant had the skills and present functional ability to earn more, that he would be hired by a new employer in a position paying equal to his skills with benefits was questionable because of his over-55 age and chronic medical conditions. Titan did not offer evidence of any specific job available to Chalfant which he could have discovered and for which he would have been qualified.

Though the jury may well have been sympathetic to Chalfant's concern with maintaining health insurance coverage in view of his age, that of his wife, and the health histories of both, the Court questions whether his concern excused him from further reasonable efforts to find more remunerative employment for which he was qualified by skill and physical ability. However, there are two prongs to the mitigation defense. Titan was also required to prove that there were suitable jobs available for Chalfant. The

jury was entitled to credit Marquardt's opinion that Chalfant's age and health history diminished his hireability and, having done so, could have concluded that even had Chalfant made a diligent effort to obtain substantially equivalent employment he would probably not have obtained such employment by the time of trial. Indeed, Titan's rejection of Chalfant's application because of his health history might have been seen by the jury as tending to prove Marquardt's point. The record thus does not compel the conclusion that as a matter of law Titan sustained its burden of proving Chalfant's damages should be reduced for failure to mitigate.

6. Punitive Damages

The jury returned a verdict of $100,000 for punitive damages. Titan contends the evidence was insufficient to submit the issue of punitive damages to the jury.[7] Titan has been down this road before. Relying on *Webner v. Titan Dist., Inc.,* 267 F.3d 828 (8th Cir. 2001) and *Ollie, supra,* it argues it did not act maliciously or in reckless disregard of Chalfant's federally protected rights because it "interpreted Dr. Sciorrota's report as finding that Chalfant had failed his physical for the position Chalfant was applying for" and also did not hire Chalfant because of the elimination of the second shift.

The plaintiff in an ADA action may obtain punitive damages upon a showing that defendant discriminated against him "with malice or with reckless indifference to [his] federally protected rights. . . . " 42 U.S.C. 1981a(b)(1). In *Kolstad v. Am. Dental Ass'n,* 527 U.S. 526 (1999), the

[7] At trial punitive damages were submitted without objection.

Supreme Court construed the terms "malice" or "reckless indifference" to "pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Id.* at 535.

In *Webner* the Eighth Circuit vacated an award of punitive damages in an ADA case, concluding that even though Webner's termination was culpable, Titan's stated reasons that his impairment precluded him from performing all but light duty tasks, it was fearful Webner would reinjure himself, and did not believe it had a job suited to his disability were "consistent with an employer acting to protect itself against the possible sporadic absence of an employee." 267 F.3d at 837. *Ollie* affirmed the district court's vacation of a punitive damage award in the belief the case was substantially similar to *Webner.* The Eighth Circuit viewed the evidence as demonstrating no more than "an unfortunately mistaken interpretation of a doctor's report, and [Titan's] attempt to protect itself and its potential employee from repeated health problems and absences." 336 F.3d at 689.

The problem with Titan's analogy to *Webner* and *Ollie* is that in this case Titan did not present the decision-maker, Holley, to testify as to the reasons for the hiring decision, leaving the jury to infer those reasons from other evidence. Perhaps, similar to *Ollie,* Holley in good faith construed or misinterpreted Dr. Sciorrota's report as indicating Chalfant had failed the physical examination for the second shift supervisor job as Titan seems to argue, but since that plainly is not what Dr. Sciorrota reported, absent an explanation from Holley the evidence is at least equally consistent with a finding that Titan knew Chalfant had in fact passed the physical, that flunking the physical was therefore not the true reason for the hiring

decision, and was pretextual. The jury may have been led to a conclusion along these lines by Titan's dissembling until the final hour about who made the decision not to hire Chalfant and why. The relevant Titan employees had distanced themselves from the hiring decision and claimed not to know who made it until Luthin, in a 180-degree departure from her deposition testimony, not only identified Holley as the decisionmaker, but described the circumstances in which the decision was made. When Holley was not tendered by Titan to explain her decision, as she surely would have been had she had something positive to say, the jury had ample reason to question the honesty of any reason given by Titan for not hiring Chalfant.

According to Titan president William Campbell Holley was "chief legal counsel" for Titan. As such, the jury could believe she was thoroughly familiar with the laws against disability discrimination. The jury found Titan regarded Chalfant's physical impairments as substantially limiting his ability to work and was a motivating factor for not hiring him though he could have done the job. Luthin's testimony puts the responsibility for the decision squarely on Holley. If the jury thus found Holley, a trained legal professional, was responsible for intentional discrimination against Chalfant in violation of his rights under the ADA and knowingly gave a false reason for the discharge, in the presence of her silence it is a short step to a finding that Titan acted in reckless disregard of Chalfant's rights under the ADA as discussed in *Kolstad*.

THE FED. R. CIV. P. 59(e)
MOTIONS PERTAINING TO FRONT PAY

Both sides ask the Court to revisit the issue of front pay. Titan contends the Court abused its discretion in awarding any front pay and the judgment should be altered or amended accordingly. Chalfant contends the Court awarded too little and the Court should alter or amend the judgment to increase the amount to a sum that would compensate Chalfant for six additional years at the rate of between $9,000 and $13,500 per year.

Relief under Rule 59(e) "is generally available only when a manifest error affects the 'correctness of the judgment.'" *Norman v. Ark. Dept. of Educ.*, 79 F.3d 748, 750 (8th Cir. 1996) (internal quotation from *Seshachalam v. Creighton Univ. Sch. of Medicine,* 545 F.2d 1147, 1147 (8th Cir. 1987), *cert. denied,* 433 U.S. 909 (1977)). The parties do not identify any error of fact or law, but ask that the Court reconsider. The Court continues to believe that front pay for a one-year period based on the difference between the wages and benefits Chalfant would have earned at Titan and those he now earns at AMPCO is an appropriate equitable remedy which gives due regard both to the jury's verdict and Chalfant's earning capacity if he makes a reasonable effort to replace the income he has lost. No front pay would be inequitable, but six years of front pay (essentially to retirement) would be an unwarranted windfall.

The request to revisit the front pay issue will be denied.

PLAINTIFF'S MOTION FOR AWARD OF ATTORNEY FEES AND EXPENSES

The above application [66, 67, 68, 79, 70, 88] is also before the Court. It is unresisted. Chalfant obtained a judgment in the amount of $178,750 on his ADA claim and Titan's post-trial motion will be denied. Consequently, Chalfant is the prevailing party for the purposes of 42 U.S.C. § 12205 and may recover a reasonable attorney fee, including litigation expenses and costs. His counsel achieved a good result and it is appropriate in this case both to award plaintiff fees as prevailing party and to use the "lodestar" method of calculation.

The lodestar method multiplies the number of hours reasonably expended by a reasonable hourly rate. *Hanig v. Lee,* 415 F.3d 822, 825 (8th Cir. 2005); *Wheeler v. Missouri Highway & Transp. Comm'n,* 348 F.3d 744, 754 (8th Cir. 2003); *Fish v. St. Cloud State Univ.,* 295 F.3d 849, 851 (8th Cir. 2002); *see Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983). A number of well-established factors guide the Court's reasonableness inquiry, *see Hensley,* 461 U.S. at 430 n.3; *Winter v. Cerro Gordo Cty. Conservation Bd.,* 925 F.2d 1069, 1074 n.8 (8th Cir. 1991), but the most important is the degree of success obtained. *Wheeler,* 348 F.3d at 754; *Fish,* 295 F.3d at 852 (citing *Hensley,* 461 U.S. at 436). Plaintiff, as the prevailing party, has the burden of establishing the hours expended and the rate claimed. *Hensley,* 461 U.S. at 437; *Wheeler,* 348 F.3d at 754.

With his most recent supplement, Chalfant claims an attorney fee totaling $47,134.50 plus costs in the amount of $5,173.24. Attorney Roger Kuhle performed the lions share of the services and was trial counsel; attorney John Haraldson assisted. Plaintiff seeks an hourly rate of $195

per hour for the services of Mr. Kuhle and $165 per hour for the services of Mr. Haraldson.

The rate should be in line with that "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson,* 465 U.S. 886, 895 & n.11 (1984); *see Fish,* 295 F.3d at 851; *Emery v. Hunt,* 272 F.3d 1042, 1048 (8th Cir. 2001). An attorney's customary rate is some evidence of a reasonable rate, but it is not controlling. *Moysis v. DTG Datanet,* 278 F.3d 819, 828 (8th Cir. 2002). The district court may rely on its own experience and knowledge of the prevailing market rates. *Hanig,* 415 F.3d at 825.

The rates claimed here are well supported in the record. Both attorneys have significant experience in employment law and Mr. Kuhle's experience is lengthy. The Court finds the reasonable hourly rate for Mr. Kuhle is $195 per hour and for Mr. Haraldson is $165 per hour.

There has been no objection to the hours spent on this case and they appear reasonable for the tasks performed, which included appropriate discovery, contested summary judgment proceedings, and a three-day jury trial in which counsel for both sides demonstrated they had prepared carefully. Though Chalfant's ADA actual disability and ADEA claims were dismissed on summary judgment, the claims were closely related factually and the Court does not believe a reduction for a lack of success on these claims would be warranted.

There has been no objection to plaintiff's expenses in the total amount of $5,173.24, the largest of which were the witness fee for plaintiff's expert, Roger Marquardt, and costs of depositions.

The Court finds the reasonable attorney fee in this case to be $47,134.50, comprised of Mr. Kuhle's time of 223.3 hours at $195 per hour and Mr. Haraldson's time of 22 hours at $165 per hour. In addition, the Court finds the reasonable litigation expenses to which plaintiff is entitled to be $5,173.24.

CONCLUSION

For the reasons indicated, defendants' Renewed Motion for Judgment as a Matter of Law, or Motion for New Trial is **denied.** Plaintiff's Fed. R. Civ. P. 59(e) Motion for New Trial or to Amend Judgment on Issue of Front Pay is **denied.** Plaintiff's Motion for Award of Attorney Fees and Expenses is **granted** and attorney fees in the amount of $47,134.50 and litigation expenses in the amount of $5,173.24 are taxed against defendants.

IT IS SO ORDERED.

Dated this 30th day of December, 2005.

/s/ Ross A. Walters
ROSS A. WALTERS
UNITED STATES MAGISTRATE JUDGE

2005 WL 1876114

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ROBERT WAYNE CHALFANT, Plaintiff, vs. TITAN DISTRIBUTION, INC. and TITAN INTERNATIONAL, INC., Defendants.	Civil No. 4:03-cv-30569 FINDINGS OF FACT ON FRONT PAY ISSUE AND ORDER FOR JUDGMENT (Filed July 8, 2005)

Plaintiff Robert Wayne Chalfant brought this action under the Americans with Disability Act (ADA), 42 U.S.C. § 12100, *et seq.,* the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.,* and the parallel provisions of the Iowa Civil Rights Act (ICRA), Iowa Code Ch. 216, *et seq.* The age claims were dismissed on motion for summary judgment. The federal and state disability claims proceeded to trial on a theory of perceived disability.

The matter came on for trial before the Court and a jury on June 6, 2005. On June 9, 2005, the jury returned a verdict in favor of Chalfant and against Titan in the amount of $60,000 for back pay and $100,000 punitive damages. Prospective relief issues were reserved for post-trial determination. After the verdict was returned, the Court was advised by counsel that they agreed placement in a job at Titan was not practical, that the front pay claim was the only prospective relief issue before the Court, and

the amount of front pay, if any, Chalfant should receive could be determined on the basis of the trial record without further proceedings.

FINDINGS OF FACT

Comprehensive findings of fact are not necessary in view of the limited issue before the Court. Chalfant was employed by Quintak, Inc., as a second shift supervisor in the tire and wheel mounting division which performed work at Titan's tire plant in Des Moines. Titan decided to itself perform the work being done by Quintak and on August 1, 2005 took over the Quintak operation. Quintak employees, including Chalfant, were given an opportunity to apply for employment with Titan.

Chalfant applied for the same second shift supervisor job he had held before. He was interviewed and given a physical examination. He worked at Titan, though not as a Titan employee, from August 1, 2002 to August 8, 2002. He was told to cease work on August 8, 2002. He was not given a job. By September 30, 2002 Titan eliminated the second shift job Chalfant had applied for.

When Chalfant applied for a job with Titan he told Titan he was physically handicapped. Chalfant had a lengthy medical history which included a prior heart attack, carpal tunnel surgery, heart bypass surgery, and arthritis in his back, neck, ankle and hands. Chalfant had, however, been doing the second shift job without accommodation and thought he could continue to do so.

Titan sent Chalfant for a physical examination. The examination record, which was provided to Titan, noted Chalfant's health history. The jury could have found that

the health history, together with Chalfant's application papers indicating he was handicapped, was sent to the Human Resources department in Titan's home office in Quincy, Illinois.

The jury could have also found that Chalfant was told by his immediate supervisor, Jerry Williams, that he was on the list of employees to be retained by Titan. However, on August 8 he was told by Williams and another supervisor that he could not continue working at Titan and was sent home. Chalfant understood the reason he was being sent home was because he had failed his physical. An annotation to that effect made by Titan's Nadis Barucic was made on Chalfant's application papers. In fact, Chalfant had not failed his physical, though the doctor had indicated that if he was expected to perform heavy lifting, a functional capacity exam would be needed. The amount of lifting required by the job was a disputed fact. However, there were no minimum physical lifting requirements for the position.

The jury found that Titan regarded Chalfant's physical impairments, as they affected his ability to engage in heavy lifting and the effects of arthritis, as substantially limiting his ability to work. The jury further found that Chalfant could have performed the essential functions of the job of second shift supervisor in the tire and wheel mounting division and that Chalfant's physical impairments were a motivating factor in the decision not to hire him. The Court believes that implicit in the jury's finding that Chalfant could perform the essential functions of the second shift supervisor job is the finding that, despite the deposition testimony of his doctor, Dr. Schoon, Chalfant could have performed jobs with medium strength demands which would leave the greater part of the unskilled labor

market open to him as testified to by the vocational rehabilitation experts, Roger Marquardt and Kathryn Bennett, and referred to in their respective reports. (Exs. 9, 15, E).

Chalfant subsequently found employment with Ampco Systems on October 7, 2002, after which he quit actively looking for other jobs. Chalfant's work at Ampco is unskilled employment as a parking garage cashier. He also performs various extra-duty work assignments. His income and benefits from Ampco are about half of what he had been making at Titan. Though mitigation of damages was a significant issue at trial, it is evident from the full back pay award that the jury did not believe Chalfant had failed to mitigate his damages.

DISCUSSION INCLUDING ULTIMATE FACTUAL FINDINGS

"The calculation of front pay, which is necessarily uncertain, is a matter of equitable relief within the district court's sound discretion." *Belk v. City of Eldon,* 228 F.3d 872, 883 (8th Cir. 2000), *cert. denied*, 532 U.S. 1008 (2001) (quoting *Hukkanen v. Int'l Union of Op. Eng'rs,* 3 F.3d 281, 286 (8th Cir. 1993)); *see Hartley v. Dillard's, Inc.,* 310 F.3d 1054, 1063 (8th Cir. 2002); *Moysis v. DTG Datanet,* 278 F.3d 819, 829 (8th Cir. 2002). The Court may not, however, contradict the jury's findings on issues properly submitted to the jury, though it may consider all of the evidence even if not determined by the jury. *Voeltz v. Arctic Cat, Inc.,* 406 F.3d 1047, 1052 (8th Cir. 2005); *Mathieu v. Gopher News Co.,* 273 F.3d 769, 778 (8th Cir. 2001); *see Salitros v. Chrysler Corp.,* 306 F.3d 562, 573 (8th Cir. 2002).

The goal in awarding front pay is to make the plaintiff whole, but in the process care must be taken not to give plaintiff a windfall. *Moysis,* 278 F.3d at 829 (citing *Standley v. Chilhowee R-IV Sch. Dist.,* 5 F.3d 319, 322 (8th Cir. 1993)). Among the equitable factors for the Court to consider is plaintiff's "ability to obtain employment with comparable compensation and responsibility . . . ," *EEOC v. HBE Corp.,* 135 F.3d 543, 555 (8th Cir. 1998); *see Ollie v. Titan Tire Corp.,* 336 F.3d 680, 687 (8th Cir. 2003), and the length of time reasonably necessary to do so. An award of front pay becomes more speculative the longer it is projected into the future. *See Peyton v. DiMario,* 287 F.3d 1121, 1128-29 (D.C. Cir. 2002) (citing *McKnight v. GM,* 973 F.2d 1366, 1372 (7th Cir. 1992)). Moreover, a lengthy front pay period to, for example, retirement may "ignore[ ] the plaintiff's duty to mitigate damages and the . . . court's corresponding obligation to estimate the financial impact of future mitigation." *Mathieu*, 273 F.3d at 779 (quoting *United Paperworkers Int'l Union Loc. 274 v. Champion Int'l Corp.,* 81 F.3d 798, 805 (8th Cir. 1996)).

In view of the evident finding of the jury that Chalfant did not fail to mitigate his damages, the Court must consider that Chalfant exercised reasonable diligence to locate other suitable employment and was unsuccessful. It is appropriate, therefore, to award some amount of front pay to make him whole. However, the time period should not be extensive. From the testimony of other similarly-situated employees who were not hired, that of Bennett and Marquardt concerning the employment opportunities which ought to remain open for Chalfant, and in view of Chalfant's solid history of steady employment and hard work, including in a supervisory capacity, the Court believes that with a diligent effort Chalfant should be able

to obtain employment with comparable compensation and benefits within about a years' time. The difference between the wage that Chalfant would have earned at Titan and his earning at Ampco is about $15,000 per year. (Ex. 11). In addition, the health insurance benefits differential between the two jobs is about $3,750 per year. The Court concludes an $18,750 front pay award is a fully sufficient equitable remedy to make Mr. Chalfant whole.

CONCLUSIONS OF LAW

1. Plaintiff Robert Chalfant should be awarded front pay in the amount of $18,750.

2. Judgment totaling $178,750 should be entered in favor of plaintiff Robert Chalfant and against defendants Titan Distribution, Inc. and Titan International, Inc., consisting of the jury's awards for back pay in the amount of $60,000 and punitive damages in the amount of $100,000, and front pay in the amount of $18,750.

ORDER FOR JUDGMENT

The Clerk shall enter judgment substantially as follows:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of plaintiff Robert Chalfant and against defendants Titan Tire Distribution, Inc. and Titan International, Inc., in the total amount of $178,750, consisting of $60,000 for back pay, $100,000 for punitive damages, and $18,750 for front pay plus interest accruing and at the rate provided by law.
>
> IT IS SO ORDERED.

Dated this 8th day of July, 2005.

/s/ Ross A. Walters
ROSS A. WALTERS
CHIEF UNITED STATES
MAGISTRATE JUDGE

2005 WL 1398494

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ROBERT WAYNE CHALFANT, Plaintiff, vs. TITAN DISTRIBUTION, INC. and TITAN INTERNATIONAL, INC., Defendants.	Civil No. 4:03-cv-30569 RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Filed May 24, 2005)

Before the Court is defendants' motion for summary judgment , filed January 27, 2005.[1] This is an action under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12100, et seq., the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq., and the parallel causes of action provided by the Iowa Civil Rights Act (ICRA), Iowa Code ch. 216, et seq. Plaintiff originally filed this lawsuit in the Iowa District Court in and for Polk County. Defendants removed this case to federal court pursuant to 28 U.S.C. § 1441 on October 15, 2003. The parties consented to proceed before a United States Magistrate Judge and the case was referred to the undersigned for all further proceedings on February 18, 2004. *See* 28 U.S.C. § 636(c). Chalfant claims Titan violated both federal and state law when it refused to hire him based on

[1] Plaintiff also filed a motion to supplement his resistance. The motion is granted.

his perceived disability and his age after Titan acquired the business for which Chalfant worked, Quintak, Inc.

I.

SUMMARY JUDGMENT

Defendants are entitled to summary judgment if the affidavits, pleadings, and discovery materials "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Erenberg v. Methodist Hospital,* 357 F.3d 787, 791 (8th Cir. 2004) (quoting Fed. R. Civ. P. 56(c)). The Court must view the facts in the light most favorable to the nonmoving party, and give that party the benefit of all reasonable inferences which can be drawn from them, "that is, those inferences which may be drawn without resorting to speculation." *Mathes v. Furniture Brands Int'l, Inc.,* 266 F.3d 884, 885-86 (8th Cir. 2001) (citing *Sprenger v. Federal Home Loan Bank of Des Moines,* 253 F.3d 1106, 1110 (8th Cir. 2001)); *see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *Erenberg,* 357 F.3d at 791; *Tademe v. St. Cloud State University,* 328 F.3d 982, 987 (8th Cir. 2003); *Lambert v. City of Dumas,* 187 F.3d 931, 934 (8th Cir. 1999); *Kopp v. Samaritan Health System, Inc.,* 13 F.3d 264, 269 (8th Cir. 1993). An issue of material fact is genuine if it has a real basis in the record. *Hartnagel v. Norman,* 953 F.2d 394, 395 (8th Cir. 1992) (citing *Matsushita,* 475 U.S. at 586-87 (1986)). A genuine issue of fact is material if it "might affect the outcome of the suit under governing law." *Hartnagel,* 953 F.2d at 395 (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)); *see Hitt v. Harsco Corp.,* 356 F.3d 920, 923 (8th Cir. 2004); *Rouse v. Benson,* 193 F.3d 936, 939 (8th Cir. 1999).

It is the non-moving party's obligation to "go beyond the pleadings and by affidavits, depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue of material fact." *Rouse,* 193 F.3d at 939; *see Hitt,* 356 F.3d at 923. In assessing a motion for summary judgment a court must determine whether a fair-minded trier of fact could reasonably find for the nonmoving party based on the evidence presented. *Anderson,* 477 U.S. at 248; *Herring v. Canada Life Assurance Co.,* 207 F.3d 1026, 1030 (8th Cir. 2000).

II.

FACTUAL BACKGROUND

Defendant Titan Distribution, Inc., is a division of defendant Titan International, Inc. (hereinafter "Titan"). Bill Campbell testified he is president of "Titan Tire." He had responsibilities for Titan Distribution. (Pl. App. at 2). Phil Stanhope at Titan was responsible for the interface with Quintak's operations. (*Id.* at 2-3). Their offices were in the Titan Tire plant on Market Street in Des Moines, Iowa. (*Id.* at 11).

Quintak, Inc. was a separate entity from Titan and performed the mounting and distribution of wheeled tire assemblies for Titan. (Pl. App. at 2). Quintak had formerly been known as DICO. (*Id.* at 12). Quintak had two facilities, Quintak East Market and Quintak West, and employed approximately 52 employees. (*Id.* at 11). Martin (Craig) Warren managed Quintak East Market; Jerry Williams supervised its wheeled tire mounting operation. (*Id.*) Warren and Williams took "some direction" from Campbell and Stanhope on a day-to-day basis. (*Id.* at 10).

Also working at Quintak were laborers hired from Action Warehouse, who received daily instruction from Warren and/or his supervisor but who were otherwise administered by an employee of Action, Brice Heberlin. (*Id.* at 11).

Plaintiff Robert Chalfant was employed as a second shift supervisor of the wheeled tire mounting operation and shipping dock at Quintak East Market. (Pl. App. at 119). His supervisor was Jerry Williams. (*Id.* at 11). Chalfant had previously been employed by DICO and came to the East Market location in 1997 when it became Quintak. (*Id.* at 12). At the time of the events in question in this case Chalfant was 56-1/2 years old. As part of his supervisory job, he would load trucks with a forklift. (*Id.* at 119). Mr. Chalfant had a medical history which included a heart attack in 1992, carpal tunnel surgery and heart by-pass surgery in 1997, and arthritis in his back, neck, ankle and hands. (*Id.*)

In July 2002 Stanhope left Titan and Campbell was assigned his Quintak responsibilities. (Pl. App. at 11). Titan decided to close down Quintak West and to bring a brake and actuator business in Ventura, Iowa, to the East Market location. (*Id.*) The plan was to cut costs, close various distribution centers and to reduce the size of Titan's operations. (*Id.* at 2).

Quintak was dissolved and Titan took over its operations on July 31, 2002 at midnight. In deciding who to retain when Titan took over Quintak, Campbell designated a certain number of job slots to fill. (Def. App. at 3). As part of that process, all Quintak employees who wanted to work for Titan had to submit applications and undergo a qualifying physical. Two individuals from Titan were responsible for taking the applications and setting up the

physicals: Nadis Barucic and Cheryl Luthin. (Pl. App. at 14).

Chalfant filled out an application for the job he had held at Quintak, second shift supervisor, which he understood had the same job duties. (Pl. App. at 120). Included in the application paper work was a form "Voluntary Applicant Identification Survey" which notified the applicant "To comply with Equal Opportunity/Affirmative Action, Titan would appreciate responses to the following questions. This information is used for informational purposes only and will not become part of your formal applicant record. However, we do encourage you to complete the survey." (*Id.* at 62). Chalfant completed the form, placing himself in age range "40-64" and checked "yes" to signify he was "physically handicapped." (*Id.*) He said he was physically handicapped not because of any particular impairment, but he thought it was appropriate because of his various ailments. (*Id.* at 122).

Chalfant interviewed with Barucic, who asked Chalfant what his job was and what he did. Chalfant told Barucic he supervised the loading of trucks with a forklift and also did some forklift work himself. Barucic asked Chalfant if he missed work and Chalfant said two or three days if he was sick. Barucic asked "you get sick?" and Chalfant told him yes, but only a couple of days.

Chalfant was later given a physical examination by the company doctor, Dr. Sciorrota, who told him nothing about the results, but gave him a slip of paper stating he could return to work in his present capacity. (Pl. App. at 52, 120-21, 122). The record of the examination noted Chalfant's health history. (*Id.* at 53-54). The exam record was provided to Barucic who in turn sent it with Chalfant's

application to Luthin at Titan's Quincy, Illinois office. (*Id.* at 13).

Chalfant returned to work. He says that in a discussion with Williams he was told by Williams that Williams had seen a list of the people to be retained by Titan and Chalfant was on it. (Pl. App. at 121). He continued to work from August 1, 2002 to August 8, 2002. How the decision was made that Chalfant would not continue at Titan and who made it are unclear and disputed. After he clocked in on August 8, Williams and Warren called Chalfant aside and told him he had not passed the physical. Chalfant protested and asked to be allowed to work until he checked out what the problem was. He was told he should contact Cheryl Luthin. He attempted to call her from Warren's office but could not reach her. Chalfant then left the plant for home (*Id.*)

Handwritten notes on Chalfant's application state "PX OK for fork lift driving" then beneath that "08/01/02 10:45 am Not pass px." (*Id.* at 56). Barucic agrees he wrote both notes on Chalfant's application but claims he did not make any determination that Chalfant had failed the preemployment physical. (*Id.* at 23-25). Barucic faxed the physical exam report to Cheryl Luthin in Quincy, Illinois. (*Id.* at 25). Barucic testified he did not have the authority to decide who would be hired. (*Id.* at 26).

Luthin testified she did not receive the applications until after Titan had filled all the positions. (Pl. App. at 31). Luthin said she did not participate in the hiring decisions. (*Id.*)

Campbell does not recall seeing the applications and gave the department managers, Warren and Williams, authority to decide who would be hired by Titan. (Pl. App.

at 3, 7,). Campbell does not know why Chalfant was not hired. (*Id.* at 8). Warren wanted to keep Chalfant but testified he was not asked about hiring him, only that he was contacted by Barucic or Luthin and told Chalfant was not supposed to continue working. (*Id.* at 16). Warren testified Barucic and Luthin had the power to decide who to hire. (*Id.* at 17). Williams remembers talking to Chalfant on his last day about the fact Chalfant was not going to be hired but does not recall how he learned this information. (*Id.* at 38).

The Medical Examination Report from Dr. Sciorrotta, who performed the physical, stated "The Examinee is medically able to do the essential functions of the job with accommodations listed below," which included "Rec Hearing Protection – OK to work at current capacity – fork lift driving." (*Id.* at 52). The doctor's notes on physical examination stated "Rec Hearing Protection. Rec. pt. return to current situation (Forklift driving). If pt. is expected to perform heavy lifting, I'd rec FCE and would need documentation from Treating Drs." (*Id.* at 53).

Quintak had no minimum physical lifting requirements. Campbell has no idea whether in August 2002 Titan had minimum lifting requirements for its employees. (Pl. App. at 9). Barucic testified he was not aware of any minimum lifting requirement for supervisory personnel at Titan. (*Id.* at 26). Jerry Williams has not seen a minimum lifting requirement while he has been at Titan. (*Id.* at 39).

After Chalfant left, his position was filled by Jerry Palmer, a 45-year-old individual. (Pl. App. at 75). Palmer had been the second shift supervisor on the tire side of the warehouse. (*Id.* at 16). Warren testified he and Williams decided Palmer would cover both the tire side and the

wheeled tire mounting/distribution sides. (*Id.* at 16, 18). Jerry Williams testified he had no input in placing Jerry Palmer in the position of second shift supervisor of the mounting side. Palmer did the second shift supervisor job for between thirty to sixty days after which Titan eliminated the second shift wheeled tire mounting/distribution facility. Action Warehouse jobs were eliminated at the same time. (*Id.*) Palmer returned to supervising the second shift on the tire side of the operation. (*Id.* at 19).

Chalfant filed a complaint with the Iowa Civil Rights Commission and with the Equal Employment Opportunity Commissions. (Pl. App. at 63-64). In response to the complaint to the Iowa Civil Rights Commission, Titan responded that Chalfant "was not hired because he failed the pre-employment physical." (*Id.*) This lawsuit followed.

III.

DISCUSSION

A. ADA[2]

As the Court sees it, this case should be analyzed as a failure to hire claim. When Titan took over Quintak's operations Chalfant worked for Titan for a brief period, but only until Titan decided whether it would retain him. Chalfant was required to apply for a job with Titan and was not hired. Titan argues this case should be looked at as a reduction in force discharge case referring to the

[2] Chalfant's disability discrimination claims are brought under the ADA and ICRA. Iowa courts analyze ICRA disability discrimination claims under the same analytical framework as the federal courts under the ADA. *Casey's General Stores, Inc. v. Blackford,* 661 N.W.2d 515, 519 (Iowa 2003).

eventual elimination of the second shift, but that reduction in force occurred after the individual hiring decision was made with respect to Chalfant and Chalfant was replaced, if only for a brief period.

There is no direct evidence of disability discrimination in this case, accordingly, the burden-shifting framework of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) applies. Chalfant must first establish a *prima facie* case by demonstrating (1) that he has an ADA-qualifying disability; (2) that he was qualified to perform the essential functions of his job with or without reasonable accommodation; (3) that he suffered an adverse employment action because of his disability. *Kratzer v. Rockwell Collins,* 398 F.3d 1040, 1044 (8th Cir. 2005); *Casey's,* 661 N.W.2d at 519.

Titan's motion challenges plaintiff's ability to prove the first element of the *prima facie* case, the existence of an ADA-qualifying disability. The ADA defines a disability as "(1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment." 42 U.S.C. § 12102(2); *see Knutson v. Ag Processing, Inc.,* 394 F.3d 1047, 1050 (8th Cir. 2005). In recent years the U.S. Supreme Court has indicated that "these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled. . . ." *Toyota Motor Mfg., Ky., Inc. v. Williams,* 534 U.S. 184, 195 (2002). "[T]o be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term." *Id.* at 198.

The relevant major life activity in this case is "working"[3] and Chalfant argues both an actual disability and regarded-as or perceived disability.[4] "Working" is substantially limited if the individual is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes." *Epps v. City of Pine Lawn,* 353 F.3d 588, 592 (8th Cir. 2003) (quoting 45 C.F.R. § 1630.2(j)(3)(i)).

1. Actual Disability

At the time he applied for a job with Titan Chalfant had a medical history of two heart attacks, cervical and lumbar fusion surgeries, surgery on an ankle, as well as multiple carpal tunnel surgeries and arthritis in his hands and ankle. (Pl. App. at 53, 54, 105). There is some evidence that these medical conditions resulted in a degree of physical impairment. In his Titan application papers Chalfant said he was "physically handicapped." Chalfant's cardiologist advised him in 1992 to quit his second full-time job running his own auto shop, and to do the work only as a hobby. (*Id.* at 120). After his second heart attack in 1997 Craig Warren, with Williams present, told Chalfant he would not have to do hard work anymore mounting

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[3] In his brief Chalfant argues he is also substantially limited in the major life activities of walking and standing, but no evidence is identified which would support such a finding.

Titan does not contest whether "working" is a major life activity. *See Knutson,* 394 F.3d at 1050-51.

[4] While Chalfant argues in his brief that he had an actual disability, the Court notes that in his removed petition he alleges only perceived disability and a record of being disabled. The Court will take it that actual disability is in the case by implied consent. Fed. R. Civ. P. 15(b).

tires, and Warren would get him a forklift job or a job doing computer work. (*Id.*) Dr. Sciorrotta's report indicated that if heavy lifting was involved in the job for which Chalfant was applying, he would recommend a full capacity exam and more information from Chalfant's treating physicians, otherwise, Chalfant was "ok to work at current capacity." (*Id.* at 52-53).

Chalfant testified in his deposition that he did not have any impairments that substantially limited any of his life activities (Def. App. at 13; Pl. App. at 62), and he evidently had performed the second shift supervisor's job without difficulty.

> [A]n individual cannot prove disability status by "merely submit[ting] evidence of a medical diagnosis of an impairment." (citation omitted). Instead, the ADA requires individuals seeking [its] protection "to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience is . . . substantial."

Ristrom v. Asbestos Workers Loc. 34, 370 F.3d 763, 769 (8th Cir. 2004) (quoting *Williams,* 534 U.S. at 198 and *Albertson's, Inc. v. Kirkingburg,* 527 U.S. 555, 567 (1999)).

Chalfant claims the combination of his physical disorders has limited his ability to do heavy lifting. A vocational rehabilitation counselor has opined, assuming Chalfant is "limited to jobs with medium and below-strength demands," that 80% of the unskilled lower-paying job market remains within his functional capacity and there is no reason he cannot perform work like he did as a shift supervisor. (Pl. App. at 89, 124).

The Eighth Circuit has held that lifting is a major life activity, *Helfter v. United Parcel Services, Inc.,* 115 F.3d 613, 616 (8th Cir. 1997) (citing 29 C.F.R. § 1630.2(i)), but a "general lifting restriction without more is insufficient to constitute a disability within the meaning of the ADA." *Brunko v. Mercy Hosp.,* 260 F.3d 939, 941 (8th Cir. 2001) (40-pound lifting restriction did not constitute disability); *see Conant v. City of Hibbing,* 271 F.3d 782, 785 (8th Cir. 2001) (30-pound lifting restriction); *Mellon v. Fed. Express Corp.,* 239 F.3d 954, 957 (8th Cir. 2001) (lifting restriction is not a disability); *Gutridge v. Clure,* 153 F.3d 898, 901 (8th Cir. 1998) (45-pound lifting restriction did not limit life activity of lifting); *Snow v. Ridgeview Medical Center,* 128 F.3d 1201, 1207 (8th Cir. 1997) (25-pound lifting restriction did not limit life activity of lifting). Chalfant does not have a definite lifting restriction and much of the relevant job market is within his capabilities. The record is plainly insufficient to demonstrate that Chalfant's physical impairments significantly restrict him in performing a class of jobs, or broad range of jobs in various classes.

2. Regarded as Having a Disability

"The 'regarded as' portion of the ADA disability definition was 'intended to combat the effects of archaic attitudes, erroneous perceptions, and myth that work to the disadvantage of persons with or regarded as having disabilities." *Knutson,* 394 F.3d at 1050 (quoting *Wooten v. Farmland Foods,* 58 F.3d 382, 385 (8th Cir. 1995)). "To be regarded as disabled . . . [plaintiff] would have to show [the employer] mistakenly believed that [plaintiff] had a physical impairment that substantially limited one or more major life activities, or . . . mistakenly believed that [plaintiff] had an actual, nonlimiting impairment which

substantially limited one or more major life activities." *Brunko,* 260 F.3d at 942 (citing *Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 489 (1999)). "When the major life activity considered to be substantially limited is working, the ADA requires at minimum that the employee is perceived as unable to work in a broad class of jobs." *Ollie v. Titan Tire Corp.,* 336 F.3d 680, 685 (8th Cir. 2003).

It is often difficult to make a case for "regarded as" disability when an applicant applies for a specific job. In such cases the employer is apt to focus on the applicant's ability to do the job in question and does not think globally about the applicant's limitations in relation to classes of jobs in the broader "world of work." Occasionally, though, the fact finder may reasonably infer a broader perceived disability from the employer's actions. Once the perception can reasonably be seen as extending well beyond the job in question, the employer is at risk on a regarded-as disability claim. *See Ollie,* 336 F.3d at 687. This is such a case.

Despite their denials the jury could reasonably infer that the decision not to hire Chalfant was effectively made for Titan by Barucic and/or Luthin. The jury could further find as follows. The shift supervisor position in question, though it required the ability to operate a fork lift, was not strenuous and there was no minimum lifting requirement. Barucic and Luthin would have known this. Chalfant had passed his physical and had been found capable of performing the job with the minimal accommodation of hearing protection. Chalfant, however, had a health history resulting in impairments which made him physically handicapped as he had said in his application papers. He had missed work due to sickness. Not all Quintak employees were to be retained. That Chalfant had not passed the physical exam was a pretext to eliminate him

from consideration because he was in a general sense "handicapped." The evidence that Chalfant was told he had not passed the physical examination is direct evidence that Chalfant was not hired because of his perceived impairments.

To be sure the record does not compel these conclusions, but if the jury reaches them with respect to an application for a position without substantial physical requirements, it might further conclude Titan mistakenly believed or assumed Chalfant had physical impairments which would have disqualified him from performing a wide range of manufacturing jobs like those at Titan's plant. So viewed, the hiring decision was arguably the product of attitudes and erroneous perceptions the regarded-as definition was intended to combat.

The motion for summary judgment will be denied with respect to the regarded-as disability claim.

B. ADEA[5]

The *McDonnell Douglas* burden-shifting analysis has been applied in ADEA cases and in the absence of direct

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[5] As with disability discrimination ICRA age discrimination cases are in general analyzed under the same framework as the ADEA. *Fisher v. Pharmacia & Upjohn,* 225 F.3d 915, 919 n.2 (8th Cir. 2000); *Bialas v. Greyhound,* 59 F.3d 759, 762-63 (8th Cir. 1995); *Landals v. George A. Rolfes Co.,* 454 N.W.2d 891, 893-94 (Iowa 1990).

There is a substantive difference between Iowa and federal law on the subject of age discrimination. Iowa's age discrimination law is "age-neutral" in that it "prohibits discrimination in employment 'because of age'" with certain exceptions not relevant in this case. *Kunzman v. Enron Corp.,* 902 F. Supp. 882, 902 (N.D. Ia. 1995); *compare* Iowa § 216.6(a) *with* 29 U.S.C. § 623(a)(1), 631(a). The first element of an ADEA prima facie case is thus not required by ICRA, but this difference is not important here as Chalfant was over 40.

evidence of age discrimination is appropriate here. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000) (assuming without deciding that *McDonnell Douglas* framework applied); *Widoe v. District No. 111 Otoe County School*, 147 F.3d 726, 732 (8th Cir. 1998); *Reynolds v. Land O'Lakes, Inc.*, 112 F.3d 358, 361 (8th Cir. 1997) (pretext case).

In a failure-to-hire case the *prima facie* case is met by proof that plaintiff (1) is over the age of forty; (2) was qualified for the job; (3) was not hired; and (4) someone sufficiently younger than plaintiff was hired for the job to raise an inference of age discrimination. *Schiltz v. Burlington Northern RR Co.,* 115 F.3d 1407, 1412 (8th Cir. 1997).

Once a plaintiff has presented a *prima facie* case, it is incumbent on the employer to rebut the resulting presumption of discrimination by producing evidence of a legitimate, non-discriminatory reason for its decision. *Mayer v. Nextel West Corp.,* 318 F.3d 803, 807 (8th Cir.), *cert. denied,* 540 U.S. 823 (2003); *Tatom v. Georgia-Pacific Corp.,* 228 F.3d 926, 931 (8th Cir. 2000). The burden then shifts back to the plaintiff to demonstrate that the reason given was not the real reason, but a pretext for age discrimination. *Mayer,* 318 F.3d at 807. It is not enough though to merely disbelieve the employer's proffered reasons for discharge, the evidence overall must create a reasonable inference that the proffered reason was a pretext for age discrimination. *Kohrt v. MidAmerican Energy Co.,* 364 F.3d 894, 898 (8th Cir. 2004) (quoting *Spencer v. Stuart Hall Co.,* 173 F.3d 1124, 1128 (8th Cir. 1999)).

Characterizing this case as a reduction-in-force discharge case Titan questions the sufficiency of the evidence on the last element of the *prima facie* case. In the reduction-in-force context the last element requires production of "some additional evidence to demonstrate age was a factor in [the] termination." *Kesler v. BASF Corp.*, 240 F.Supp.2d 956, 961 (S.D. Ia. 2002); *see Stidham v. Minnesota Mining and Mfg., Inc.*, 399 F.3d 935, 938 (8th Cir. 2005). As indicated previously, for summary judgment purposes the Court does not believe this case should be analyzed as a reduction-in-force case. A decision was made not to hire Chalfant for reasons specific to him. Titan told the Iowa Civil Rights Commission Chalfant was not hired because he had failed to pass his pre-employment physical. Indeed Titan's letter to the Iowa Civil Rights Commission asserted that "Titan did not terminate" Chalfant and implied that had Chalfant passed the physical he would have been employed by Titan. (Pl. App. at 63). The second shift supervisor position was not eliminated until a little over a month after Chalfant was rejected. In the meantime he was replaced in the position by the younger Mr. Palmer.

Viewed as a regular failure-to-hire case (and putting aside for the moment the evidence of disability discrimination), Chalfant has identified sufficient evidence to make a *prima facie* case of age discrimination.

Though the summary judgment analysis applicable to reduction-in-force cases does not apply, the claim of a reduction-in-force nonetheless is a legitimate nondiscriminatory reason for the employment decision sufficient to shift the burden back to Chalfant to demonstrate reduction in force was not the real reason, but a pretext for age discrimination. Chalfant only needs to point to Titan's statements to the Iowa Civil Rights Commission as

evidence reduction in force was not the real reason. The difficulty is the connection to Chalfant's age. It is important to remember that "the focus of inquiry at the summary judgment stage 'always remains on the ultimate question of law: whether the evidence is sufficient to create a genuine issue of fact as to whether the employer intentionally discriminated against the plaintiff because of [the plaintiff's age].'" *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011, 1018 (8th Cir. 2005) (quoting *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1337 (8th Cir. 1996)) (bracketed portion original to *Rothmeier*).

With this in mind the Court concludes Chalfant has not generated a genuine issue of material fact concerning the ultimate question of age discrimination. There is evidence of pretext, but pretext for disability not age discrimination. There is no significant evidence of age discrimination beyond Chalfant's age and that of his replacement for a month or so, Palmer. Chalfant argues only the situations of two other Quintak employees, Robert Buss and Vernon Christensen.[6] Buss, age 63 at the time, was allegedly replaced by Williams who was ten years younger. Christensen's job was allegedly given to a 25-year-old employee.[7] The mere fact that younger workers were hired to do the job that two other employees

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[6] Christensen also has an age and disability discrimination action pending in this Court. Buss has an age discrimination and retaliation action pending in this Court.

[7] That Christensen's job was given to a 25-year-old is not supported in the summary judgment record. While relevant material in another case may be considered, our Local Rules require that "those parts of the pleadings, depositions, answers to interrogatories, admissions, exhibits, and affidavits" on which a party relies in resisting a motion for summary judgment must be set out in an appendix. LR 56.1(b). The record in Christensen's case does contain a reference to a 25-year-old being given the job formerly held by Christensen.

had performed does not raise an inference that age was a factor in Chalfant's case. The only workforce age evidence is in Warren's affidavit in which he states twenty-three full-time employees were hired by Titan to replace the fifty Quintak employees, thirteen of whom were over age forty. (Def. App. at 16).

This then is a case in which the evidence of pretext is probative of a reason for the employment decision other than age, Chalfant's perceived disability. As a consequence, the elements of the *prima facie* case coupled with rejection of Titan's proffered reason for the hiring decision do not suffice to demonstrate intentional age discrimination as they might otherwise. *See St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 511 (1993). Titan is entitled to summary judgment on the age discrimination claims.

IV.

RULING AND ORDER

Defendant's motion for summary judgment is **granted in part and denied in part**. The motion is denied with respect to the ADA and ICRA disability discrimination claims and is granted with respect to the age discrimination claims.

IT IS SO ORDERED.

Dated this 24th day of May, 2005.

/s/ Ross A. Walters
ROSS A. WALTERS
CHIEF UNITED STATES
MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 06-1414

Robert Wayne Chalfant,

Appellee

v.

Titan Distribution, Inc. and
Titan International, Inc.,

Appellants

Appeal from U.S. District Court for the
Southern District of Iowa – Des Moines
(4:03-cv-30569-RAW)

ORDER

The petition for rehearing by the panel filed by appellants is denied.

February 26, 2007

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

42 U.S.C. Sec. 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes –

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being ***regarded as*** having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

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42 U.S.C. § 12111. Definitions

As used in this subchapter:

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar

weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include –

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C.A. § 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C.A. § 812].

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the ***essential functions*** of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the ***essential functions*** of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include –

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include –

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

U.S.C. § 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes –

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration –

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual

with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on –

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control,

of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if –

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate

forms and in separate medical files and is treated as a confidential medical record, except that –

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary

medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

29 CFR 1630.2

TITLE 29 – LABOR

COMMISSION

PART 1630 – REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT – Table of Contents

Sec. 1630.2 Definitions.

(a) Commission means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(b) Covered Entity means an employer, employment agency, labor organization, or joint labor management committee.

(c) Person, labor organization, employment agency, commerce and industry affecting commerce shall have the same meaning given those terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(d) State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(e) Employer – (1) In general. The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working

day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) Exceptions. The term employer does not include –

(i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) A bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(f) Employee means an individual employed by an employer.

(g) Disability means, with respect to an individual –

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such an impairment; or

(3) Being regarded as having such an impairment.

(See § 1630.3 for exceptions to this definition).

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) Substantially limits –

(1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of working –

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the

average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

(k) Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(l) Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

(m) Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. (See § 1630.3 for exceptions to this definition).

(n) Essential functions – (1) In general. The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(o) Reasonable accommodation. (1) The term reasonable accommodation means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(p) Undue hardship – (1) In general. Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered

entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(q) Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements

established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

(r) Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.